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NO. _____

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IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1989

GLENN D. RAMIREZ,

*Petitioner,*

vs.

OREGON STATE BAR,
OREGON STATE BAR PROFESSIONAL LIABILITY FUND,

*Respondents.*

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LAW OFFICE OF
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## QUESTIONS PRESENTED FOR REVIEW

1. Is it constitutional for the Respondents to charge private lawyers for liability insurance to practice law in Oregon?

(a) Under this question, governmental and corporate lawyers, although excluded from the requirement, vote to allow it and on the amount to be charged for such insurance.

(b) Petitioner, a private attorney since 1952, was charged under such scheme sums ranging from $450 in 1978 to $2500 in 1989.

2. Does such scheme create an unlawful monopoly?

(a) In insurance?

(b) In the practice of law?

3. Is the scheme so obviously illegal as to constitute racketeering in the minds of reasonable and prudent persons?

4. Can a court agency engage in selling insurance to private lawyers?

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LIABILITY FUND,
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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, Glenn D. Ramirez, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on January 16, 1990.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 USCA Section 1257(3). This follows jurisdiction in the United States District Court under 28 USCA Section 1331, 18 USCA Section 1965. Jurisdiction in the Court of Appeals for the Ninth Circuit is under 28 USCA 1291. Jurisdiction in the United States Supreme Court is invoked under 28 USCA Section 1257(3). The Memorandum Opinion of the Court of Appeals for the Ninth Circuit was entered on October 3, 1989, and its Order Denying Rehearing was entered on January 16, 1990.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment I, United States Constitution:

> **Freedom of religion, speech, and press; right to assemble and petition.** Congress shall make no law respecting an establishment of

> religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V, United States Constitution:

> **When prosecution to be by presentment or indictment; double jeopardy; self-incrimination; due process; compensation for property taken for public use.** No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1, United States Constitution:

> **Citizenship; privileges and immunities; due process; equal protection.** All persons born or

naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

15 USCA Section 1, 2 and 1012 of the Sherman Act:

Section 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: **Provided,** That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law or public policy now or

hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: **Provided further,** That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a

misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 1012:

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: **Provided**, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

18 USCA 1962:

(a) It shall be unlawful for any person who has received any income

derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is

> engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Oregon Revised Statutes 9.160, 9.162(1), 9.010(1), 9.080(2), 9.625 and 9.030.

ORS 9.160 provides:

> Except for the right reserved to litigants by ORS 9.320 to prosecute or defend an action in person, no person shall practice law or represent that person as qualified to practice law unless that person is an active member of the Oregon State Bar.

ORS 9.162(1) provides:

> 'Person' means a human being and where appropriate, a public or private corporation, an unincor-

porated association, a partnership, a government or a governmental instrumentality.

ORS 9.010(1) provides:

An attorney, admitted to practice in this state, is an officer of the court; and the Oregon State Bar is a public corporation and an instrumentality of the Judicial Department of the government of the State of Oregon and is authorized to carry out the provisions of ORS 9.030 to 9.755. The bar is subject to the following statutes applicable to public bodies: "..." However, the bar is not subject to any other statute applicable to a state agency, department, board or commission or public body unless such statute expressly provides that it is applicable to the Oregon State Bar.

ORS 9.080(2) provides:

The board shall have the authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional liability insurance and shall be empowered, either by itself or in conjunction with other bar organizations, to do whatever is necessary and convenient to implement this provision, including the authority to own, organize and sponsor any insurance organization authorized under the laws of the State of Oregon and to establish a

lawyer's professional liability fund. This fund shall pay on behalf of active members of the state bar engaged in the private practice of law whose principal offices are in Oregon, all sums as may be provided under such plan which any such member shall become legally obligated to pay as money damages because of any claim made against such member in rendering or failing to render professional services for others in the member's capacity as an attorney or caused by any other person for whose acts or omissions the member is legally responsible. The board shall have the authority to assess each active member of the state bar engaged in the private practice of law whose principal office is in Oregon for contributions to such fund, to establish definitions of coverage to be provided by such fund and to retain or employ legal counsel to represent such fund and defend and control the defense against any covered claim made against such member. The board shall have the further authority to offer optional professional liability coverage on an underwritten basis above the minimum required coverage limits provided under such fund, either through such fund, through a separate fund or through any insurance organization authorized under the laws of the State of Oregon, and may do whatever is necessary and convenient to implement this provision. Any fund so established shall not be subject to the Insurance Code of the State

of Oregon. Records of a claim against the fund are exempt from disclosure under ORS 192.410 to 192.505.

(b) For purposes of paragraph (a) of this subsection, an attorney is not engaged in the private practice of law if the attorney is a full-time employee of a corporation other than a corporation incorporated under ORS chapter 58, the state, an agency or department thereof, a county, city, special district or any other public or municipal corporation or any instrumentality thereof. However, an attorney who practices law outside of the attorney's full-time employment is engaged in the private practice of law.

ORS 9.625 provides:

The board of governors may adopt a plan to relieve or mitigate pecuniary losses to the clients of active members caused by dishonest conduct of those members in their practice of law. The plan may provide for establishing, administering and dissolving a separate fund and for payments from the fund to reimburse losses and costs and expenses of administering the fund. The board may adopt rules of procedure to carry out the plan. The insurance laws of the state shall not apply to this fund.

ORS 9.030 provides:

> Members shall vote in and be eligible for nomination and election to the board of governors from the region in which they maintain their principal offices.

## STATEMENT

Petitioner filed his Complaint in the United States District Court for Oregon alleging that ORS 9.080(2)(a) was unconstitutional, was a violation of the First, Fifth and Fourteenth Amendment of the United States Constitution, and a violation of the Plaintiff's civil rights under 42 USCA sec. 1983, the Federal Court having jurisdiction under 28 USCA sec. 1331. The basis of Petitioner's challenge was that ORS 9.080(2)(a) abridged the freedom of speech and the right of people to petition the government for redress of grievances, and, took the Plaintiff's money without due process of law under the Fifth and Fourteenth

Amendments of the United States Constitution. Plaintiff alleged that the Defendants had taken $6,760 of his money for liability insurance when such insurance had nothing to do with the qualifications of a person to practice law, was detrimental to the judicial system, and, was the unlawful selling of protection requiring Petitioner to contribute and support said scheme contrary to his personal dignity and pursuit of justice. That the acts of the Defendants were wrongful and oppressive entitling Plaintiff to punitive damages.

As the Second Cause of Action, Petitioner charged an unlawful restraint and control of trade and commerce in the practice of law, including Plaintiff's practice, prohibited by 15 USCA sec. 1 giving Federal Court jurisdiction under

15 USCA sec. 15 entitling Plaintiff to treble damages.

As a Third Cause of Action, Petitioner alleged that this was a racket under 18 USCA sec. 1962 giving a Federal Court jurisdiction under 18 USCA sec. 1965.

Defendants moved for a Summary Judgment, based upon an affidavit of Lester L. Rawls, an employee of the Defendants, administering the Defendants' Professional Liability Fund. It declared that the Fund was in operation since 1978 and had provided legal malpractice insurance coverage for all attorneys in Oregon engaged in the private practice of law; he further alleged that the Oregon State Bar was a public corporation and an instrumentality of the Judicial Department of the State of Oregon with offices in Lake Oswego, Clackamas County, Oregon;

that the 1977 Assembly passed the Act codified as 9.080 giving the Board of Bar Governors authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional liability insurance and to organize an insurance organization to provide such insurance. It further declared that the Board of Bar Governors in 1977 passed a resolution requiring all active members of the Oregon State Bar engaged in the private practice of law to carry professional liability insurance with aggregate limits of not less than $100,000.00 and requiring them to obtain such liability insurance through the Oregon State Bar Professional Liability Fund. It further declared that after the enactment of the statute and adoption of the resolution, the Fund commenced

providing insurance coverage for legal malpractice for active members of the Bar engaged in the private practice of law in Oregon, requiring members to purchase such insurance at a cost assessed by the Board of Bar Governors approved by the Bar and paid to the Fund. That following 1977, attorneys engaged in the private practice of law have been required to contribute the amounts assessed, and the Fund has provided insurance for legal malpractice; that prior to Defendants' Fund going into effect, approximately 35% of the attorneys in private practice in the State of Oregon were without any legal malpractice coverage insurance; that the administration and operation of the Fund is actively supervised by the Bar and direction and supervision of the Fund is provided by a Board of Directors appointed by the Bar; that the only

business of the Fund is legal malpractice insurance, and no other business; that it is not engaged in gambling activities, business of gambling, or the collection of any debts incurred or contracted in the course of gambling activity or in the business of gambling. That the Fund has not engaged in the business of lending money or making loans and has not collected or attempted to collect any debts, the collection of which are unenforceable because of any laws relating to usury.

Additionally, the Defendants filed the Affidavit of their Attorney, that the resolution providing liability insurance and requiring attorneys to purchase it from the Defendants was adopted in 1977.

The Plaintiff, Petitioner herein, filed a Counter Affidavit as follows:

> I was admitted to the Bar of the State of Oregon in 1952, and have

been engaged in private practice since said time to the present. I have paid the required Bar dues and the contributions to the clients' security fund as required by the Oregon State Bar. Prior to the establishment of the Oregon State Bar Professional Liability Fund (FUND), I carried malpractice insurance on which the annual premium was less than $500.00 per year. Since the commencement of the Fund operations, the premiums started at $450.00 a year and has escalated to $2,500.00 a year, in addition to the Bar dues and contributions to the clients' security fund. That I paid the premium under protest.

2. The defendants occupy offices at the same address in the city of Lake Oswego, Clackamas County, Oregon.

3. ORS 9.080 and its passage by the Oregon State Legislature was largely influenced by the Oregon State Bar and individuals acting on its behalf.

4. The 1977 Board of Bar Governors' Resolution was passed by the influence of the same group of individuals that influenced the Oregon State Legislature in passing ORS 9.080. This was based on a finding that 40% of Oregon lawyers did not have malpractice insurance, no findings of losses to public was made.

5. From the initial history of the Fund, it appears that the Fund had no reserves from which to pay claims for legal malpractice and was in fact procuring insurance from other companies by the use of the initial premiums required, using the excess to build up a reserve, and that initially the amounts charged were comparable with private insurance premiums. Instead of purchasing insurance, I was purchasing protection from the Fund in that it was necessary to pay such protection to remain a member of the Oregon State Bar and to be able to continue practice. The Bar solicited opinions from the Courts and public officials as to the legality of such protection.

6. The protection provided by the Fund is to the members of the Bar and not to the public in that an attorney must be insured whether or not he has injured clients, and injured clients can only recover if they follow the rules of a policy of which they had no notice. If a client makes a claim after an attorney has discontinued practice, there is no protection even though there was coverage when the attorney performed. Cantwell v. Estate of Goakey and Coe and Fund, garnisher, CA A36657, SC S32843.

7. Due to the high cost of the premiums charged by the Funds, I and other attorneys are required to charge their clients more to offset said costs, denying substantial

members of the public legal assistance, and covering the rest of the attorneys who take more than they can handle at my expense.

8. In 1985 and 1986, I had occasion to present a claim against the Fund for the negligent actions of two attorneys, O. W. Goakey and Hal I. Coe, who were insured by the Fund and against whom a judgment had been obtained by Lee and Gloria Cantwell. This claim was in the form of a garnishment and demand for payment. A judgment had been taken against these two attorneys and entered in the favor of the Cantwells for $24,194.00 with interest of $9,140.00, plus interest, and costs of $221.95. However, instead of paying said liability as required by the law and the insurance coverage, the Fund filed a complaint with the Oregon State Bar, attempting to charge misconduct on my part for asserting the claim by appointing a representative for the estate of the deceased, O. W. Goakey, to have an entity against whom a judgment could be taken after the Fund and widow of the deceased had refused to either set up the estate or represent the estate after it was established. Thereafter in argument before the Oregon Court of Appeals, the attorney representing the fund argued that they had sought and obtained the opinions of judges of both the Court of Appeals and Oregon Supreme Court, specifically suggesting that the Chief Justices

of both Courts as well as those of other judges and officials had privately approved the interpretation that the Fund was seeking to deny the Cantwells' claim. The Court of Appeals and the Supreme Court denied the appeal and review of the Cantwells' without opinion.

9. I believe ORS 9.080 2a is unconstitutional in that it permits the defendants to place a restriction on free spirit by permitting them to make an unlawful charge for the exercise thereof by me as an attorney. It is in restraint of trade in that I am required to buy insurance (protection) from them and the proceeds of such unlawful collections create a potential for unlawful influence of public and judicial officials so as to constitute racketeering under RICO 18 USCA sec. 1962. It is money taken by illegal process without due process in law and constitutes an attempt by the Oregon State Bar to set up an illegal industry to collect monies under the guise and title of insurance premiums and set a legal malpractice insurance monopoly at expense of plaintiff.

10. The Fund's annual assessment has caused many Oregon lawyers to resign, withdraw or quit the law thereby making them ineligible to practice law in Oregon, which unlawfully reduces competition and my business.

11. That my practice and the general practice of law affect persons in interstate commerce in the United States.

## REASONS FOR GRANTING THE PETITION

Under the foregoing scheme, the Oregon State Bar (herein referred to as the "Bar") commenced collecting liability insurance for the Oregon State Bar Professional Liability Fund (herein referred to as the "Fund") from Petitioner and members of the Bar in private practice in 1978 initially charged $450.00 per year therefor and escalating to $2500.00 in 1989.

Petitioner paid the above liability premiums under protest. He contended that these charges affected the charges to his clients, as well as the charges of other attorneys to their clients, and, caused many Oregon attorneys to withdraw from the practice of law in Oregon. In

addition, in open court proceedings before the Oregon Appellate Court, it was made to appear that the Oregon Appellate Judges had assisted in the drafting of the Fund's coverage provisions and interpreted such coverage provisions adverse to Petitioner's client in a pending garnishment case.

The Bar did not explain the meteoric rise in premiums, but, did affirm that it was not engaged in gambling or related activities.

Petitioner is, and has been, a member of the Bar since 1952 engaged in private practice and, was paying less than $500.00 per year for malpractice insurance in 1977. He paid the premiums required by the Bar to practice law in Oregon under protest, and is contending that said premiums were unconstitutionally extorted from him for an illegal

purpose. Petitioner wants judgment for his money back plus penalties and attorney fees and costs, and a declaration that the aforesaid scheme is unconstitutional and must be discontinued.

Bar dues from 1977 to 1989 increased from $125.00 to $252.00 as compared to Bar premiums of $450.00 to $2500.00 for the same period. This is taking into consideration the inclusion of a clients' security fund in Bar dues as provided under ORS 9.625.

Although Petitioner is seeking a personal recovery from the Defendants, based upon an unconstitutional charge made upon him to practice law, the questions presented have far more reaching significance. Insurance is for a profit. The profit promotes greed and greed is a virus that cannot be stopped

without drastic consequences once it has spread. The seriousness of the problem is compounded by its direct attack upon the United States Constitution, attack by limiting and controlling those who would defend it. The case is without precedent on the issue of constitutionality. There is no legal constitutional interpretation which would give governmental and corporate lawyers the right to regulate lawyers in private practice making them subject to an insurance charge while exempting governmental and corporate lawyers from such charge.

The District Court erred in failing to recognize that separating lawyers in private practice as a class was one thing and allowing them to be regulated by exempt lawyers is another. Greed carries with itself a two-way evil. First, it takes what it can and second, it is

willing to sacrifice others for its own wrong as long as it doesn't cost itself anything. Let's regulate private practice with an insurance assessment we don't have to pay.

The effect is not personal just to the Petitioner and Oregon, as greed is not a contained virus. Consider the effect of a $2500 assessment on a new or prospectively new lawyer. He has his school to pay back, his new family, set up expenses and dues, before he opens his doors. Now add $2500 on to that - up front. Corporate and governmental practice eliminate these requirements. The effect of the assessment is to eliminate the option of private practice to the new lawyer. It controls private practice to those who can pay rather than those who are qualified to practice.

In their Affidavit in Support of Motion for Summary Judgment, Defendants asserted that thirty-five (35%) percent of the attorneys in private practice in Oregon were without liability insurance.

There is no issue in this Petition regarding the authority of the Legislature to regulate the practice of law so as not to interfere with the action of the Judiciary, and, for that purpose, to provide the cost of qualifying procedures. These costs are acceptable burdens on the exercise of constitutional privileges and rights. Liability premiums are not qualifying and undermine the power of the Constitution to protect itself by taking away the lawyers that would do so. There is not factual or legal authority in support of the legality or constitutionality of

liability insurance as a requirement to practice law.

The case of Hass v. Oregon State Bar USDC Civil Number 87-196-JU appealed to the United States Court of Appeals for the Ninth Circuit, Case Number 87-3996 is a stipulated case on the issue of the Anti-Trust effect of the liability insurance. The Honorable George Juba, Magistrate of the United States District Court for Oregon summarized that suit as being one for Declaratory Judgment as to whether the professional liability insurance challenged herein was constitutional under the commerce Clause of the United States and whether it violated Federal Anti-Trust Laws. The parties had stipulated that the Oregon Legislature passed ORS 9.080(2)(a) as above, that a resolution of the Board of Bar Governors was passed requiring all

lawyers in private practice to carry liability insurance. He then found that the language of the Sherman Act was not intended to limit actions of the State, and was therefore exempt from the Federal Anti-Trust Laws. It further found that the Commerce Clause was intended to restrict the power of states to interfere with Interstate Commerce, but that public interest in being adequately protected from legal malpractice outweighed its burden on Interstate Commerce. As the findings of the Magistrate exceeded the stipulation, the question of the policy declaring powers of the Magistrate, and its summary of facts without such facts poses a question of due process. This was not challenged in the Court of Appeals for the Ninth Circuit. It was expanded to include additional arguments with a dissenting opinion. The

difference between the majority and dissenting opinion was whether or not the insurance monopoly established in favor of the Bar was subject to the Anti-Trust provisions of the Sherman Act because it was not subject to State regulation under the provision of ORS 9.010(1):

> ...the bar is not subject to any other statute applicable to a state agency, department, board or commission or public body unless such statute expressly provides that it is applicable to the Oregon State Bar.

and ORS 9.080(2)(a):

> ...Any fund so established shall not be subject to the Insurance Code of the State of Oregon. Records of a claim against the fund are exempt from disclosure under ORS 192.410 to 192.505.

Although the Hass case did not deal with Petitioner's First, Fifth and Fourteenth Amendment claims, the District Judge in the instant case combined Petitioner's claims under these rights to be covered by the State right to regulate

the practice of law thereby finding that taking $2500.00 per year of his money to practice law did not deprive him of his property without due process of law under the Fourteenth Amendment nor the Fifth Amendment, nor did it breach his rights under the First Amendment of the United States Constitution. The Court was impressed by four index pages of irrelevant cases ranging from bar dues to the regulation of raisins, allowing for some assessments, including insurance, to engage in the various enterprises. There is a substantial difference between qualifying to practice and setting forth an onerous and illegal condition of practice. No public need was established for legal liability insurance in Oregon or elsewhere.

Petitioner, in this appeal, maintains that the Bar charging him (and the

entire privately law practicing membership) liability insurance to practice law is unconstitutional under the United States Constitution because it unconstitutionally controls the membership by the size of the premium, the conditions of insurance and the Court agency writing the contract with the consultation of the court which will interpret it.

This should be distinguished from qualifying Petitioner (and membership) to practice law and charging the costs of such qualification. Bar dues, license fees or similar charges to maintain a Bar are not relevant here. The issue here involves disqualification from the practice of law in the private sector if you don't pay the Bar Insurance. This leaves the governmental and corporate attorneys exempt under the law and those who are in

control or wish to protect their assets. Who's left to protect the Constitution?

Petitioner has standing to challenge the constitutional nature of the charge, first under the statute ORS 9.080 being a legislative authorization for a non-qualifying but controlling charge on attorneys and the defendants collecting such charge from Petitioner. The judiciary is affected in that it is from the lawyers that we draw our judiciary.

The rights of the Petitioner to practice law are protected under the First Amendment.

United Mine Workers v. Illinois Bar Association, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 343 (1967), 19 L. Ed. 2d 430:

> We start with the premise of the rights to assemble peaceably and to petition for redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are

> intimately connected both in origin and in purpose with the other First Amendment rights of free speech and free press. All these, though not identical, are inseparable...The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraint so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have, therefore, repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because there are enacted for the dealing with some evil within the state's legislative competence or even because the laws do in fact provide a helpful means of dealing with such an evil...

Schware v. State Board of Bar Examiners of New Mexico, 353 U.S. 232 1 L. Ed. 2d 796, 77 S. Ct. 752 (at 1 L. Ed. 2d 801):

> A state cannot exclude a person from the practice of law or from any other occupation in any manner or for reasons that contravene the due process or equal protection of the Fourteenth Amendment ... A state can require high standards or qualification such as good moral character or proficiency in its law, before it admits an applicant to the bar, that any qualification must

> have a rational connection with the applicant's fitness or capacity to practice law ... Obviously an applicant cannot be excluded merely because he is a republican or a negro or a member of a particular church. Even in applying permissible standards, officers of the state cannot exclude an applicant when there is no basis for their finding that he fails to meet any standards, or when their action is impediously discriminatory...

Abood v. Detroit Board of Education, 431 U.S. 209, 52 L. Ed. 2d 261 97 S. Ct. 1782 (52 L. Ed. 2d at page 283):

> The decisions of this Court establish within mistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendment.

Bar dues to serve the ends of improving the quality of legal service available to the people of this state are a legitimate and a state policy. Lathrop v. Donohue, 367 U.S. 820, 6 L. Ed. 2d 1191, 81 S. Ct. 1826.

Nowhere in any of the authorities or in the instant case is insurance designated as a quality necessary to practice law or that buying insurance from the Respondents is such a legal qualification.

SHERMAN'S ANTI-TRUST ACT 15
UNITED STATES CODE ANNOTATED
SECTION 1, SECTION 15, SECTION 1012

Giving the Oregon State Bar the exclusive right to force lawyers to buy liability insurance from it, not subject to supervision by the Insurance Code of Oregon, is a prohibited monopoly under the Sherman Anti-Trust Act 15 USCA 15.

The Oregon State Bar is subject to regulation under the Sherman Anti-Trust Act. USA V. Oregon State Bar, 384 F. Supp. 507 (1974, USDC).

The argument suggested in the Court of Appeals for the Ninth Circuit case of Hass v. Oregon State Bar, is that if not

regulated by the Legislature, it is regulated by the Board of Bar Governors.

As the requirement of insurance was made by government and corporation lawyers exempting themselves from such provisions and such private lawyers who attended the Bar meeting to impose the requirement of insurance on private lawyers it is constitutionally unfair. Then to have them govern the insurance through their Board of Bar Governors perpetuates the oppression. It is a regulation of the practice of law by practicing lawyers exempt from their own regulation.

In view of the seriousness of the initial problem, i.e. the Respondents collecting insurance from the Petitioner to permit the Petitioner to practice law in Oregon, constitutes a serious violation of the Sherman Anti-Trust Act 15

USCA Section 1. This is criminal under 15 USCA Section 2. Unless it is exempt under 15 Section 1012, which deals with the regulation of insurance which is exempt if not regulated under State law. In the present case, we have liability insurance as expressly declared to be not regulated under State law.

The Defendants argue that because it is subject to regulation by the Board of Bar Governors, that it is regulated under State law. Such that is regulated by both covered and noncovered members, i.e. government, corporation, and lawyers in private practice, it is a self-regulated monopoly with one group oppressing those subject to it. The wrong is organizing a monopoly to squeeze out private lawyers. The fact that lawyers are charging other lawyers makes it no less an illegal monopoly. There is an element of

unfairness where under Bar authority one group of lawyers can charge another insurance to practice law. If they're selling insurance, it's a monopoly.

Under 15 USCA section 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restrain of trade or commerce among the several States, or with foreign nations, is declared to be illegal (exceptions are provided which do not apply in this case)

Under 15 USCA section 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor...

An exemption for insurance is provided under 15 USCA Section 1012, which provides that the business of insurance shall be subject to the laws of several states which regulate or tax such business. It specifically provides that

the Sherman Act shall be applicable to the business of insurance to the extent that such business is not regulated by state law.

ORS 9.080 provides that the liability insurance issued by the Bar shall not be subject to the insurance laws of the State of Oregon. Thus, without regulation, it is subject to the Sherman Act. And, being subject to regulation by the Sherman Act and in violation thereof, it is subject to the penalties therein provided.

SELLING FORCED INSURANCE CONSTITUTES RACKETEERING

Under 18 USCA Section 1962, if it is unlawful for the Defendants to force the Petitioner to purchase insurance from them to practice law, it would be unlawful for them to collect money from the Petitioner and invest it in the insurance business which it has operated and main-

tained under the designation of the Fund and subjects the Defendants to the penalties provided therein.

## CONCLUSION

WHEREFORE, a Writ of Certiorari should issue to review the decisions of the lower Courts herein permitting the Defendants to collect insurance premiums from Petitioner to practice law in Oregon in violation of the First, Fifth, and Fourteenth Amendments of the United States Constitution, and in violation of the Sherman Act prohibiting such monopolies and the RICO Act prohibiting such actions.

Respectfully submitted,

GLENN D. RAMIREZ
Petitioner and Attorney
in Pro Se

APPENDIX A

[U.S. DISTRICT COURT
DISTRICT OF OREGON
Southern Division
F I L E D Jun 20, 1988
ROBERT M. CHRIST, CLERK
By/s/_____, Deputy]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

| | | |
|---|---|---|
| GLENN D. RAMIREZ<br><br>Plaintiff,<br><br>v.<br><br>OREGON STATE BAR, et al.,<br><br>Defendant. | ) | Civil No. 87-6625<br><br>O R D E R<br><br>(Defendant's Motion for Summary Judgment) |

The court has now before it a motion for summary judgment by defendants. Said motion is made on the grounds that there are no genuine issues of material fact, and defendants are entitled to judgment as a matter of law. The motion is opposed.

Plaintiff is a member of the Oregon State Bar. As a member of the Oregon

State Bar, plaintiff is required to carry professional liability insurance which must be obtained through the Oregon State Bar Professional Liability Fund. This requirement, which is challenged by plaintiff, is specifically authorized by an act which was passed by the Oregon Legislative Assembly and is codified as ORS 9.080, which provides as follows:

> (2)(a) The Board [Board of Bar Governors] shall have the authority to require all active members of the State Bar engaged in private practice of law whose principal offices are in Oregon to carry professional liability insurance and shall be empowered, either by itself or in conjunction with other bar organizations, to do whatever is necessary and convenient to implement this provision, including the authority to own, organize, and sponsor any insurance organization authorized under the laws of the State of Oregon and to establish a lawyers professional liability fund.

Plaintiff's complaint asserts three claims. First, plaintiff asserts that the statute authorizing the creation of a

professional liability fund is unconstitutional and in violation of plaintiff's civil rights. Second, plaintiff asserts that the operation of the professional liability fund is a violation of the Sherman Act. Plaintiff's third claim is that the collection of assessments by the professional liability fund is in violation of Title 18, United States code, Section 1962 (Racketeer Influenced and Corrupt Organizations, "RICO").

Plaintiff's first claim, alleging that the statute authorizing the defendants to establish the professional liability fund is unconstitutional, asserts as its basis in law the First, Fifth, and Fourteenth Amendments to the United States Constitution. Beginning with the First Amendment issue, plaintiff's pleading does not suggest how the operation of the professional liability

fund in any manner interferes with the right of free speech or the right to petition for redress of grievances. Since plaintiff's opposition to defendants' motion for summary judgment provides no factual support for his First Amendment claims, defendants are entitled to dismissal of same. Architectural Building Products, Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

Plaintiff's Fifth Amendment claim is equally deficient. Plaintiff quite simply has failed to show how the Oregon State Bar professional liability fund deprives him of due process of law. States have broad power to regulate the practice of law. The license to practice, the continuation thereof, the regulation of practice, and procedure for disbarment and discipline, are all within

the province of the states. United Mine Workers v. Illinois Bar Association, 389 U.S. 217 (1967). The requirements of annual registration and the payment of annual fees to engage in the practice of law do not violate due process guarantees nor deny equal protection. Ables v. Jones, 587 F.2d 850 (6th Cir. 1978).

Furthermore, it has been held that the maintenance of medical malpractice insurance as a condition to licensing does not offend or violate due process. Pollock v. Methodist Hospital, 392 F. Supp. 393, 396 (E.D. La. 1975). In Pollock, the court held that the doctor whose privilege to practice was suspended after he failed to comply with a malpractice insurance requirement had no remedy and no property interest sufficient to invoke the due process requirements of the Fourteenth Amendment. Obtaining and

maintenance of medical malpractice insurance as a condition to licensing bears a rational relationship to the health and welfare of the citizens of the state by providing protection to patients who may be injured as a result of medical malpractice, and therefore does not violate the guarantees of due process. Jones v. State Board of Medicine, 555 P.2d 399, 408 (Idaho 1976), cert. denied, 431 U.S. 914 (1977).

It logically follows that a mandatory requirement that attorneys maintain legal malpractice insurance as a condition of practicing law is equally inoffensive to the Constitution. This conclusion is supported by the case of Lathrop v. Donahue, 367 U.S. 820, 843 (1961), where the court said:

> We think that the Supreme Court of Wisconsin, in order to further the state s legitimate interests in raising the quality of professional

> services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers...

Plaintiff also contends that he is denied equal protection guaranteed him under the Fourteenth Amendment as a result of the legislative classification of persons under ORS 9.200, which requires members of the Oregon Bar to pay fees and dues. This court has no right to interfere with the legislative classification of persons under ORS 9.200 if that classification is rationally related to a valid state objection. Martin v. Walton, 368 U.S. 25 (1961); Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957). As Justice Power said in McGinnis v. Royster, 410 U.S. 263, 276 (1973):

> [L]egislative solutions must be respected if the "distinctions drawn have some basis in practical

> experience." South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966) ....

In the present case, ORS 9.200 empowers the Oregon State Bar to implement ORS 9.080 by requiring its members to pay for professional liability insurance. The court finds that the legislative classification in question is rationally related to a valid state objective, specifically, protecting those injured by attorney malpractice. "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 489 (1955). Thus ORS 9.200 does not violate the Equal Protection Clause of the Fourteenth Amendment.

Defendants are entitled to summary judgment on plaintiff's first claim.

Plaintiff's second claim alleges that the defendants conspired to restrain and control trade and commerce in the practice of law in violation of Section 1 of the Sherman Act. It has previously been decided in this district that:

> Because the establishment of the Professional Liability Fund and the elimination of competition in the provision of minimum legal malpractice insurance was clearly contemplated by the State legislature, and is actively supervised by the State, the Board of Bar Governors' resolution challenged here is exempt from the federal antitrust laws by virtue of the stated action doctrine.

Hass v. Oregon State Bar, No. 87-196-JU Civil at 6 (D. Or. June 12, 1987). The court in the instant case concurs in the Hass decision.

Defendants are entitled to summary judgment on plaintiff's second claim.

Plaintiff's third and final claim is that the acts of defendants constituted a violation of 18 U.S.C. sec. 1962, RICO,

asserting that the Oregon State Bar was in essence engaged in illicit activities and attempted to collect an unlawful debt as a result of said activities. Therefore, plaintiff argues, the defendants violated the provisions of RICO entitling him to recovery under 18 U.S.C. sec. 1964. The court considers this claim to be absolutely frivolous and not worthy of further discussion since it is abundantly clear that RICO was never meant to apply to situations remotely resembling that of the case at bar.

Defendants are entitled to summary judgment as to plaintiff's third claim.

The clerk of the court shall enter a judgment dismissing plaintiff's complaint with prejudice.

DATED at Anchorage, Alaska, this 17th day of June, 1988.

/s/ H. R. HOLLAND
United States District Judge

APPENDIX B

[F I L E D
Oct 3 1989
CATHY A. CATTERSON,
Clerk
U.S. COURT OF APPEALS]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| GLENN D. RAMIREZ, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | NO. 88-3972 |
| | ) | |
| vs. | ) | D.C. No. 87-6625 |
| | ) | |
| OREGON STATE BAR, OREGON STATE BAR PROFESSIONAL LIABILITY FUND, and DOES 1 through 100, | ) | MEMORANDUM* |
| | ) | |
| Defendants-Appellees. | ) | |

Appeal from the United States District Court for the District of Oregon
H. Russel Holland, District Judge, Presiding
Argued and Submitted September 14, 1989
Portland, Oregon
Before: PREGERSON, TROTT, RYMER, Circuit Judges

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Glenn D. Ramirez ("Ramirez") appeals pro se from the district court's order granting summary judgment in favor of the Oregon State Bar ("the Bar") and the Oregon State Bar Professional Liability Fund ("the Fund"). Ramirez argues that: (1) Or. Rev. Stat. sec. 9.080(2)(a), which requires all active members of the Bar whose principal offices are in Oregon to carry malpractice insurance issued by the Fund, violates the First, Fifth, and Fourteenth Amendments of the United States Constitution; (2) Or. Rev. Stat. sec. 9.080(2)(a) impermissibly restrains trade in violation of the Sherman Antitrust Act, 15 U.S.C. sec. 1 (1982); and (3) by requiring that Ramirez purchase malpractice insurance from the fund, appellees have violated the Racketeer Influenced and Corrupt Organizations

Act (RICO), 18 U.S.C. secs. 1961-1968. We affirm the district court.

I.

Ramirez is member of the Bar. Pursuant to Or. Rev. Stat. sec. 9.080(2)(a),[1] "all active members of the Bar engaged in the private practice of law whose principal offices are in Oregon" are required to carry professional liability insurance issued by the Fund. Section 9.080(2)(b) provides that

> an attorney is not engaged in the private practice of law if the attorney is a full time employee of a corporation . . .,the state, an agency or department thereof, a county, city, special district or any other public or municipal corporation or any instrumentality thereof.

Or. Rev. Stat. sec. 9.080(2)(b) (1987).

In the district court s view, appellant's failure to explain how the statute operates to interfere with his right of free speech or his right to petition for redress of grievances warranted summary judgment in appellees' favor. The district court further held that appellant had failed to demonstrate how the mandatory malpractice provision operates to deprive him of property without due process of law. The court also concluded that the legislative classifications set forth in the statute are rationally related to a valid state objective and therefore do not violate the Equal Protection Clause of the Fourteenth Amendment. Finally, the court held that the statute is exempt from the antitrust laws by virtue of the state action doctrine and that appellant's RICO claim

is "absolutely frivolous." We review de novo a grant of summary judgment. California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987), cert. denied., __ U.S. __, 108 S. Ct. 698, 98 L. Ed. 2d 650 (1988).

II.

Although fashioned as a single claim for relief, appellant's first claim actually consists of three claims: (1) the statute impermissibly discriminates against appellant in violation of the Equal Protection Clause of the Fourteenth Amendment; (2) the statute deprives appellant of property without due process; (3) the statute abridges appellant's right of free speech. We deal with each claim in turn.

Equal Protection

Appellant argues that the statute violates the equal protection clause of the fourteenth amendment because it discriminates against a certain class of lawyers: those engaged in "the private practice of law." A legislative classification based on the nature and status of an attorney's clientele/employer neither infringes on a fundamental right, see Lupert v. California State Bar, 761 F.2d 1325, 1327, n.2 (9th Cir.)(discrimination based on whether law student attends accredited or unaccredited law school does not infringe upon fundamental right), cert. denied, 474 U.S. 916, 106 S. Ct. 241, 88 L. Ed. 2d 251 (1985); Edelstein v. Wilentz, 812 F.2d 128, 132 (3rd Cir. 1987)(no fundamental right to practice law), nor discriminates against a suspect

class. Accordingly, the statute is subjected to rational basis scrutiny. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976). We have also noted that "(t)he Supreme Court is extremely deferential to legislative classifications in actions challenging regulation of licensed professions." Lupert, 761 F.2d at 1328 (citing Williamson v. Lee Optical, 348 U.S. 483, 487-489, 75 S. Ct. 461, 99 L. Ed. 563 (1955)).

The application of the statute solely to attorneys engaged in private practice is rationally related to the harm the legislature sought to remedy: namely, protecting public litigants from attorneys who commit malpractice. The exemption for attorneys employed by governmental entities or corporations reflects a logical nexus between the

class of persons the statute seeks to protect and those members of the Bar who might be in a position to cause harm.

There is also no support for appellant's claim that the additional economic burden imposed on him constitutes a violation of the equal protection clause. Whatever additional costs may be imposed on appellant by operation of the statute are undoubtedly passed along to his clients. The state may rationally conclude that the benefits which accrue from ensuring that attorneys have malpractice insurance coverage outweigh whatever additional costs of legal representation the statute may create. See Person v. Assn. of Bar of City of New York, 554 F.2d 534, 538-39 (2d Cir.)(New York legislature could rationally find that benefits accruing from state bar disciplinary rule prohibiting contingent

expert fee arrangements outweigh obstacles to financing litigation), cert. denied, 434 U.S. 924, 98 S. Ct. 403, 54 L. Ed. 2d 282 (1977).

Due Process

Appellant also failed to come forward with any evidence in support of his claim that the statute violates his right to due process of law. The statute does not interfere with appellant's ability to practice law and, as already noted, is rationally related to the state's interest in protecting its citizens from attorney malpractice.

First Amendment

The district court also correctly found that appellant had failed to come forward with any evidence in support of his claim that the statute operates to interfere with his right of free speech or his right to petition for

redress of grievances. Ramirez does not explain how the statute "would chill an attorney's speech in the context of his or her professional conduct." Edelstein, 812 F.2d at 133 (rejecting attorney's First Amendment challenge to New Jersey rule granting immunity to ethics grievants).

III.

As we recently decided, the statute withstands appellant's antitrust challenge. See Hass v. Oregon State Bar, No. 87-3996 (9th Cir. August 30, 1989). We agree with the district court's conclusion that appellant's RICO claim is "absolutely frivolous."

IV.

Accordingly, we affirm the district court's order. Each side to bear its own costs on appeal.

endnotes

1. Hass v. Oregon State Bar, No. 87-3996, (9th Cir. August 30, 1989, a related case, traced the evolution of sec. 9.080:

> In 1977, exercising its delegated authority, the Board [of directors of the State Bar] passed a resolution, effective July 1, 1978, requiring all Oregon-based attorneys to carry malpractice coverage with aggregate limits of not less than $100,000 [subsequently raised to $300,000]. The resolution also established the fund contemplated in sec. 9.080(2)(a), which the Board denominated [the fund]. The resolution further provided that the required malpractice coverage for all active members in the private practice of law, with the exception of patent attorneys, shall be obtained through the Fund.
>
> Pursuant to the foregoing resolution, Oregon-based attorneys have been required, since 1978, to participate in the Fund, and the Fund has provided such attorneys with legal malpractice coverage. An Oregon-based attorney's failure to participate in the Fund results in suspension from membership in the Bar.

Id. at 10309-10. (emphasis in original).

APPENDIX C

[F I L E D
JAN 16, 1990
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| GLENN D. RAMIREZ, | ) | |
| | ) | NO. 88-3972 |
| Plaintiff-Appellant, | ) | |
| | ) | D.C. No. CV87-6625-H |
| v. | ) | |
| | ) | ORDER |
| OREGON STATE BAR, OREGON STATE BAR PROFESSIONAL LIABILITY FUND, and DOES 1 through 100, | ) | |
| | ) | |
| Defendants-Appellees. | ) | |

Before: PREGERSON, TROTT, and RYMER, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and

no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Supreme Court, U.S.
FILED
APR 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-1483

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

GLENN D. RAMIREZ,
Petitioner,

v.

OREGON STATE BAR,
OREGON STATE BAR PROFESSIONAL
LIABILITY FUND, AND
DOES 1 THROUGH 100,
Respondents.

## BRIEF IN OPPOSITION

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Petitioner

LAYOUT-CREATIVE IMAGES 1990

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## QUESTIONS PRESENTED

Petitioner's statement of the questions presented is neither accurate, brief or clear. Three questions are presented:

1. Whether a resolution of the Oregon State Bar Board of Governors establishing a professional liability insurance fund and requiring private practitioners to contribute to the fund violates petitioner's rights under the First, Fifth and Fourteenth Amendments of the Constitution;

2. Whether a resolution of the Oregon State Bar Board of Governors establishing a professional liability insurance fund and requiring private practitioners to contribute to the fund violates the Sherman Act; and

3. Whether a resolution of the Oregon State Bar Board of Governors establishing a professional liability insurance fund and requiring private practitioners to contribute to the fund violates the Racketeer Influenced and Corrupt Organizations Act.

## LIST OF PARTIES

There are no parties not named in the caption. None of the named and identified parties are corporations.

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## JURISDICTION OF THE COURT

Petitioner's statement is acceptable.

## CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's statement is acceptable.

## STATUTES INVOLVED

Petitioner's statement is acceptable.

## STATEMENT OF THE CASE

Petitioner's Statement of the Case in inaccurate. Plaintiff, a member of the Oregon State Bar, is required to maintain professional liability insurance through the Professional Liability Fund.

The Oregon State Bar is a public corporation and an instrumentality of the Judicial Department of the State of Oregon. The Oregon State Bar established the Professional Liability Fund pursuant to the authority of ORS 9.080. The Oregon State Bar actively supervises the Professional Liability Fund through a board of directors appointed by the Oregon State Bar.

The business of the Professional Liability Fund is insurance, and only insurance. It has not engaged in gambling activities, debt collection or the business of lending money.

## BASIS FOR JURISDICTION IN THE U.S. DISTRICT COURT

The District Court had subject matter jurisdiction of the action under 28 USC § 1331.

## REASONS WHY THE WRIT SHOULD BE DENIED

The petition for certiorari before this Court is prolix and largely incoherent. It is replete with misstatements of fact and law.

## A. ORS 9.080 Does Not Violate the First, Fifth and Fourteenth Amendments of the U.S. Constitution.

### 1. The Equal Protection Claim.

The Ninth Circuit correctly found that ORS 9.080(2) does not violate the equal protection clause of the Fourteenth Amendment. Petitioner cites the Equal Protection Clause in his Complaint, but neither his Complaint nor his Affidavit discusses what legislative classification petitioner finds objectionable. *See* App. A. Any claim that it is constitutionally impermissible for the Legislature to require malpractice insurance of lawyers but not other professionals or workers, must fail.

Legislative classifications not involving suspect classes or impacting the exercise of fundamental rights are reviewed under the same standard as are alleged denials of substantive due process. That is, the classification will be upheld so long as it bears a rational relationship to an end of government that is not constitutionally prohibited. *See McGinnis v. Royster*, 410 US 263, 270, 93 S Ct 1055, 35 L d2d 282 (1973); 2 Rotunda, Nowack & Young, *Treatise on Constitutional Law: Substance and Procedure*, § 18.3 (1986).

It is not necessary for the legislature to address all of the problems in a particular field at one time. As stated by the Court in *Williamson v. Lee Optical of Okla.*, 348 US 483, 75 S Ct 461, 99 L Ed 563 (1955).

> "Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner v. Texas*, 310 US 141, 84 L ed 1124, 60 S Ct 879, 130 ALR 1321. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semler v. Oregon State Dental Examiners*, 294 US 608, 79 L ed 1086, 55 S Ct 570. The legislature may select one phase of one field and apply a remedy there, neglecting the others. *A. F. of L. v. American Sash & Door Co.*, 335 US 538, 93 L ed 222, 69 S Ct 258, 260, 6 ALR2d 481. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." 348 US at 489.

As in *Williamson v. Lee Optical of Okla.*, there is nothing to suggest that point has been reached in this case.

Furthermore, as the Ninth Circuit aptly noted, ORS 9.080(2) is rationally related to the harm the legislature sought to remedy. That harm is the harm suffered by the public when uninsured counsel commit malpractice. The Ninth Circuit also correctly found that the state may rationally conclude, as it did, that the benefits of assuming malpractice insurance coverage outweigh whatever additional costs the statute may create.

**2. The Due Process Claim.**

Petitioner alleged that the requirement of mandatory insurance coverage deprived him of life, liberty or property without due process of law in violation of the Fifth and Fourteenth Amendments. *See* App. A. Because there are no allegations that statutory or administrative procedures were not followed, it is clear that petitioner's claim is that the requirement is a denial of substantive due process. This claim must fail.

Since 1937, the United States Supreme Court has abandoned the concept that it may serve as a super legislature, striking down those statutes that are unwise or contrary to the Justices' better judgment. In *Ferguson v. Skrupa*, 372 US 726, 731-32, 83 S Ct 1028, 10 L Ed2d 93 (1963), the Court stated:

> "[W]e emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' ... The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas."

*See* 2 Rotunda, Nowak & Young, *Treatise on Constitutional Law: Substance and Procedure*, *supra*, at § 15.4 (1986).

Unless the challenge is that the legislation impacts a fundamental right, the focus of inquiry is whether there is

any conceivable basis for finding that the law is rationally related to a legitimate end of government. In upholding an Oklahoma statute that required a licensed optometrist or ophthalmologist to fit lenses to a face or duplicate or replace other frames or lenses, the Court specifically rejected a substantive due process claim, stating the rule as follows:

> "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative manner was a rational way to correct it."

*Williamson v. Lee Optical of Okla.*, *supra*, 348 US 483, 487-88, 75 S Ct 461, 99 L Ed 563 (1955).

Strict scrutiny, or the requirement that there be a compelling interest for the enactment of a law, is reserved for laws that impact fundamental rights. These rights include the right to freedom of association, *e.g.*, *NAACP v. Alabama ex rel Patterson*, 357 US 449, 460-61, 78 S Ct 1163 2 L Ed2d 1488 (1958); the right to participate in the electoral process, *e.g.*, *Harper v. Virginia State Board of Elections*, 383 US 663, 86 S Ct 1079, 16 L Ed2d 169 (1966); the right to interstate travel, *e.g.*, *Shapiro v. Thompson*, 394 US 618, 89 S Ct 1322, 22 L Ed2d 600 (1969); the right to privacy, *e.g.*, *Roe v. Wade*, 410 US 113, 93 S Ct 705, 35 L Ed2d 147 (1973); and the right to fairness in the criminal process, *e.g.*, *Douglas v. California*, 372 US 353, 83 S Ct 814, 9 L Ed2d 811 (1963). *See* 2 Rotunda, Nowack & Young, *supra*, at § 15.7.

The mandatory malpractice insurance statute challenged here does not impact any of the fundamental rights described above. If there is any rational relationship between the statute and a legitimate end of government, it must be upheld. *See Schware v. Board of Bar Examiners*, 353 US 232, 239, 77 S Ct 752, 1 L Ed2d 796 (1957) (holding that qualifications for membership in a bar must have a rational connection with the applicant's fitness or capacity to practice law).

The requirement that attorneys maintain professional malpractice insurance clearly furthers the legitimate state interest in protecting those injured by attorney malpractice. As stated in petitioner's affidavit, at the time of

enactment of ORS 9.080(2), forty percent (40%) of Oregon lawyers did not have malpractice insurance. The costs of liability insurance were rising, fewer insurers were willing to write legal malpractice insurance and a number of legal malpractice claims was also increasing. *See* 37 Op Atty Gen 1381-82 (1977); Mallen, *Legal Malpractice* § 700 (2d Ed 1981).

Other courts that have faced challenges to medical malpractice insurance requirements have concluded that such statues do not violate the right to due process. In *Jones v. State Board of Medicine*, 555 P2d 399 (Idaho 1976), *cert denied*, 431 US 914, 97 S Ct 2173, 53 L Ed2d 223 (1977), the Court likened the requirement of medical malpractice insurance to the requirement of obtaining vehicle insurance before a registration is issued, or the requirement of a bond before issuance of a barber's, court reporter's or well driller's license. The Court stated:

> "We hold that such requirements of obtaining medical malpractice insurance as a condition to licensure bear a rational relationship to the health and welfare of the citizens of the state by providing protection to patients who may be injured as a result of medical malpractice and to this extent does not violate the guaranties of due process of law."

555 P2d at 408.

Similarly, in *Pollock v. Methodist Hospital*, 392 F Supp 393 (ED La 1975), the Court held that a doctor whose privilege to practice was suspended after he failed to comply with the malpractice insurance requirement had no liberty or property interests sufficient to invoke the due process requirements of the Fourteenth Amendment.

The United States Supreme Court ruled in *Lathrop v. Donahue*, 367 US 820, 81 S Ct 1826, 6 L Ed2d 1191 (1961), that requiring membership and payment of dues to a state bar as a condition to practicing law does not violate the Fourteenth Amendment. The Court stated:

> "We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may

> constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, . . . ."

367 US at 843.

Other courts have held that the requirements of annual registration and the payment of annual fees to engage in the practice of law do not violate due process guaranties or deny equal protection. *Ables v. Fones*, 587 F2d 850 (6th Cir 1978); *May v. Supreme Court of Colorado*, 508 F2d 136 (10th Cir 1974), *cert denied*, 422 US 1008, 95 S Ct 2361, 45 L Ed2d 671 (1975).

The Ninth Circuit correctly found that petitioner has failed to come forward with any evidence that ORS 9.080(2) violates his right to due process. The Ninth Circuit was also correct in finding that ORS 9.080(2) does not interfere with petitioner's ability to practice law and is rationally related to the state's interest in protecting its citizens from malpractice.

### 3. The First Amendment Claim.

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech ... or the right to petition the government for a redress of grievances." The constitutional protections afforded by the First Amendment for speech and press were fashioned to assure an unfettered exchange of ideas for bringing about political and social changes desired by the people. *New York Times Co. v. Sullivan*, 376 US 254, 84 S Ct 710, 11 L Ed2d 686 (1964); *Bond v. Floyd*, 385 US 116, 87 S Ct 339, 17 L Ed2d 235 (1966). The right to petition the government for redress and the right to free speech, while separate guaranties, are related and generally subject to the same constitutional analysis. *Wayte v. United States*, 470 US 598, 105 S Ct 1524, 84 L Ed2d 547 (1985).

Petitioner's Complaint does not suggest how the operation of the Professional Liability Fund in any manner interferes with the right of free speech or the right to petition the government for redress of grievances. *See* App. A. Similarly, petitioner's affidavit in opposition to the

motion for summary judgment also does not support the First Amendment claim. *See* App. B.

In the absence of any dispute as to the existence of an element essential to that party's case, summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 US 317, 322, 106 S Ct 2548, 91 L Ed2d 265 (1986). As the rule has been restated by the Ninth Circuit:

> "[I]f the nonmoving party will bear the burden of proof at trial as to an element essential to its case, and that party fails to make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element, then summary judgment is appropriate."

*Cal. Arch. Bldg. Prod. v. Franciscan Ceramics*, 818 F2d 1466, 1468 (9th Cir 1987), *cert denied*, 484 US 1006, 108 S Ct 698, 699, 98 L Ed2d 650 (1988).

In this case, petitioner has neither pleaded nor asserted in his affidavit in what way his right to free speech or his right to petition the government is in any way abridged, inhibited, restrained or in any manner impacted by the operation of the Professional Liability Fund pursuant to the statute. The Ninth Circuit did not err in affirming the District Court's finding that petitioner failed to cite any evidence that ORS 9.080(2) interferes with his right of free speech or his right to petition for redress of grievances. Never has petitioner explained how the statute would chill an attorney's speech in the context of an attorney's professional conduct.

**B. The Sherman Act Claim.**

The Ninth Circuit previously decided that ORS 9.080 withstands antitrust challenge. *Hass v. Oregon State Bar*, 883 F2d 1453 (9th Cir., 1989). *See* App. C. On January 12, 1990, Hass petitioned for a writ of certiorari, and the Oregon State Bar has submitted its Brief in Opposition. *See Fred Hass v. Oregon State Bar*, S. Ct. No. 89-1352. As in the matter of *Hass*, *supra*, the Ninth Circuit correctly found that petitioner's Sherman Act claim also lacks merit.

## C. The RICO Claim.

Petitioner's Third Claim is set forth in paragraphs 13-16, inclusive, of petitioner's Complaint. *See* App. A. Paragraph 13 is as follows:

> "That the acts of the defendants charged herein constituted a violation of 18 USCA §1962, making it unlawful for any person in the *collection of an unlawful debt in which such person has participated as principal*, having an interest in or control of any enterprise which is engaged in when the activities of which affect interstate or foreign commerce. The jurisdiction of this Court is pursuant to 18 USCA §1965." (Emphasis added).

Petitioner further alleges in paragraph 15:

> "That the defendants violated the provisions of the RICO, Title 18 §1962, in violating plaintiff's rights under the First, Fifth and Fourteenth Amendment of the United States Constitution by extracting insurance payments from the plaintiff to permit him to practice law in the State of Oregon, contrary to such constitutional provisions and 42 USCA §1983, . . . ."

The allegation in paragraph 13, "collection of an unlawful debt in which such person has participated as principal" is a paraphrase of a portion of 18 USC § 1962(a), which reads in part as follows: "or through collection of an unlawful debt in which such person has participated as a principal . . . ."

To state a claim under § 1962(a), the pleading must allege that:

(1) A person who is a principal in, *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F2d 1393, 1398 n 4 (9th Cir 1986);

(2) An enterprise, *United States v. Feldman*, 853 F2d 648, 655 (9th Cir 1988);

(3) Engaged in or affecting interstate

commerce, *Capobianco v. McMahon*, CCH 1985-1 Trade Cases ¶ 66,365 (DC Mass 1984);

(4) Used or invested income or proceeds from the collection of an unlawful debt in the enterprise, *Kimmel v. Peterson*, Fed. Sec. Law Rep. (CCH) ¶ 99,225 at 99,967 (ED Pa 1983); and

(5) The foregoing caused injury to the business or property of the plaintiff, 18 USC § 1964(c); *Hunt v. Weatherbee*, 626 F Supp 1097, 1100-01 (D Mass 1986).

An unlawful debt is one incurred or contracted in gambling activity, which activity was in violation of law or unenforceable under law; or one incurred in violation of or unenforceable because of the laws relating to usury. 18 USC § 1961(6).

Not only is the plaintiff required to plead the foregoing elements, in this district "a RICO plaintiff should plead the facts constituting the predicate offenses with the particularity required by Rule 9(b)," Panner, Chief Judge, in *Schnitzer v. Oppenheimer & Co.*, 633 F Supp 92 (D Or 1985).

Whatever particularity in pleading is required to assert a claim under 18 USC § 1962, petitioner cannot make those allegations in this action. Unlawful debts under the Act are only those incurred or contracted in a gambling activity in violation of law and in the business of gambling in violation of law; or, one unenforceable because of law relating to usury or one made in the business of lending money at usurious rates. Simply stated, respondents through the Professional Liability Fund have not and do not collect debts within the meaning of 18 USC § 1961(6). Petitioner's payment of annual assessments to the Professional Liability Fund was not the collection of an unlawful debt.

The trial court rejected this claim as "absolutely frivolous". The Ninth Circuit also agreed with the lower court's conclusion.

## CONCLUSION

For the foregoing reasons, the Court should deny certiorari.

Respectfully submitted,

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Susan K. Eggum
McEWEN,GISVOLD, RANKIN & STEWART
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APPENDIX A

GLENN D. RAMIREZ
514 Walnut Street
Klamath Falls, OR 97601
Phone: (503) 884-9275

In propia persona

IN THE UNITED STATES DISTRICT COURT FOR DISTRICT OF OREGON

| | | |
|---|---|---|
| GLENN D. RAMIREZ, Plaintiff, v. OREGON STATE BAR, OREGON STATE BAR PROFESSIONAL LIABILITYFUND, and DOES 1 through 100, Defendants. | ) CIVIL NO. 87-6625<br>) COMPLAINT AND REQUEST FOR JURY TRIAL<br>) (To declare ORS 9.080 unconstitutional and to recover monies paid; violation Sherman Anti-Trust Act, 16 USCA §1, treble damages; and viola tion Racketeering Influence on Corrupt Organization Act (RICO), treble damages, attorney fees, in vestigation fees and costs.) |

PLAINTIFF ALLEGES:

FIRST CAUSE OF ACTION

1. This cause is to have the Court declare that ORS 9.080 (2)(a) is unconstitutional as in violation of the First, Fifth and Fourteenth Amendments of the United

States Constitution, and a violation of the plaintiff's civil rights under 42 USCA §1983; this Court has jurisdiction under 28 USCA §1331.

2. That the defendants, the Oregon State Bar, hereinafter referred to as OSB, and Oregon State Bar Professional Liability Fund, hereinafter referred to as OSBPLF, are public bodies organized under the laws of the State of Oregon, and under said laws have the capacity to be sued.

3. That the true names and capacities, whether individual or corporate, associate or otherwise, of defendants, Does 1 through 100 inclusive, are unknown to the plaintiff, and, therefore, sues said defendants by such ficticious [sic] names. Plaintiff is informed and believes, and, therefore, alleges that each of these defendants designated herein as a Doe conspired with each other and with the named defendants intentionally and, in some other manner, are responsible for the events and happenings herein referred to, causing injury and damages to the plaintiff as herein alleged.

4. That at all times relevant, there was a statute of the State of Oregon, ORS 9.080(2), which states as follows:

The board shall have the authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional liability insurance and shall be empowered, either by itself or in conjunction with other bar organizations, to do whatever is necessary and convenient to implement this provision, including the authority to own, organize and sponsor any insurance organization authorized under the laws of the State of Oregon and to establish a lawyers' professional liability fund. This fund shall pay, on behalf of active members of the state bar engaged in the private practice of law whose principal offices are in Oregon, all sums as may be provided under such plan which any such member shall become legally obligated to pay as money damages because of any claim made against such member as a result of any act or omission of such member in rendering or failing to render professional services for others in the member's capacity as an attorney or caused by

any other person for whose acts or omissions the member is legally responsible. The board shall have the authority to access each active member of the State Bar engaged in the private practice of law whose principal office is in Oregon for contribution to such fund, to establish definitions of coverage to be provided by such fund and to retain or employ legal counsel to represent such fund and defend and control the defense against any covered claim made against such member. Any fund so established shall not be subject to the Insurance code of the State of Oregon. Records of the claim against the fund are exempt from disclosure under ORS 192.410 to 192.500."

5. ORS 9.080 (2)(a) is unconstitutional and in violation of the First Amendment of the United States Constitution, abridging the freedom of speech and the right of people to petition the government for regress of grievances; the Fifth Amendment of the United States Constitution prohibiting the deprivation of property without due process of law and taking of private property for public use without just compensation; and the Fourteenth Amendment of United States Constitution prohibiting the state from abridging the privileges and immunities of the citizens of the United States, depriving persons of property without due process of law and denying persons within its jurisdiction equal protection of laws and is contrary to the civil rights provision of 42 USCA §1983, giving citizens right of action for such violations.

6. That the plaintiff at all times herein relevant has been a citizen and inhabitant of the State of Oregon, licensed to practice law therein and a member of the Oregon State Bar.

7. That the defendants, in addition to requiring plaintiff to pay bar dues for membership in the Oregon State Bar and contribute to a clients' security fund, by virtue of the aforesaid statute, have required the plaintiff to purchase insurance from the defendants as a necessary requirement for the practice of law before the courts of the State of Oregon. The penalty for failing to purchase said insurance from the defendants is the revocation of one's membership in the Oregon State Bar and one's right to practice law in Oregon. That by such means, defendants took from plaintiff the sum of $9,260.00, which sum should be returned to the plaintiff with interest at the rate of 9% per annum.

8. That the procurement of insurance from the defendants has nothing to do with the qualifications of a person to practice law, is detrimental to our judicial system, and is the unlawful selling of protection from the protectors, so that requiring plaintiff to contribute and support such a set up is further contrary to his personal dignity and pursuit of justice.

9. That the acts of the defendants were wrongful and oppressive, entitling the plaintiff to punitive damages.

SECOND CAUSE OF ACTION

10. The defendants conspired in so acting to restrain and control trade and commerce in the practice of law, including the plaintiff's practice, which act is forbidden by 15 USCA §1, and this Court has jurisdiction under 15 USCA §15.

11. That defendants formed an insurance company under the name and style of the Oregon State Bar Professional Liability Fund (OSBPLF), under the authority of ORS 9.080 (2)(a), thereby creating an insurance monopoly which required plaintiff to purchase insurance therefrom at rates arbitrarily set by the OSBPLF.

12. That under such guise and activity, defendants extorted the sum of $9,260.00 from plaintiff, to his loss and damage thereof; that plaintiff is entitled to treble damages therefor, together with his investigating fees and attorney fees incurred herein, under 15 USCA 15.

THIRD CAUSE OF ACTION

13. That the acts of the defendants charged herein constituted a violation of 18 USCA §1962, making it unlawful for any person in the collection of an unlawful debt in which such person has participated as principal, having an interest in or control of any enterprise which is engaged in when the activities of which affect interstate or foreign commerce. The jurisdiction of this Court is pursuant to 18 USCA §1965.

14. That the Oregon State Bar was engaged in licit governmental enterprise,, to-wit: a licensing quali-

fication of members entitled to practice law in the State of Oregon.

15. That the defendants violated the provisions of the RICO, Title 18 §1962, in violating plaintiff's rights under the First, Fifth and Fourteenth Amendment of the United States Constitution by extracting insurance payments from the plaintiff to permit him to practice law in the State of Oregon, contrary to such constitutional provisions and 42 USCA §1983, and said fund did extract $9,260.00 from plaintiff to plaintiff's damage therein, entitling plaintiff to treble damages thereon in the sum of $27,780.00.

16. That plaintiff is entitled to his investigating and attorney's fees herein under 18 USCA 1964.

WHEREFORE, plaintiff prays for a decree of this Court as follows:

A. Count 1: that ORS 9.080 (2)(a) be and the same declared to be unconstitutional and unlawful as being in violation of Amendments One, Five, and Fourteen of the United States Constitution; and that plaintiff recover judgment against defendants in the sum of $9,260.00 with interest thereon at the rate of 9% per annum and for his costs and disbursements herein incurred.

B. Count 2: that plaintiff have judgement against the defendants, and each of them, in the sum of $27,780.00, together with his investigating and attorney's costs and costs of suit herein.

C. Count 3: that plaintiff have judgment against the defendants, and each of them, in the sum of 27,780.00 with interest and investigating costs and attorney costs, together with costs of suit herein.

D. That plaintiff is entitled to a jury trial herein, and that a judge from outside Oregon be assigned to hear and decide matters herein as the local judges are members of the Defendant OSB and indebted to it to some extent for their present appointment.

/s/ Glenn D. Ramirez
GLENN D. RAMIREZ, In pro per

APPENDIX B

GLENN D. RAMIREZ
514 Walnut Street
Klamath Falls, OR 97601
Phone: (503) 884-9275

In propia persona

IN THE UNITED STATES DISTRICT COURT FOR DISTRICT OF OREGON

SOUTHERN DIVISION

| | | |
|---|---|---|
| GLENN D. RAMIREZ, | ) | |
| | ) | CIVIL NO. 87-6625 |
| Plaintiff, | ) | |
| | ) | COUNTER AFFIDAVIT OF |
| v. | ) | PLAINTIFF TO |
| | ) | DEFENDANTS' MOTION |
| OREGON STATE BAR, | ) | FOR SUMMARY |
| OREGON STATE BAR | ) | JUDGMENT |
| PROFESSIONAL | ) | |
| LIABILITYFUND, and | ) | |
| DOES 1 through 100, | ) | |
| | ) | |
| Defendants. | ) | |
| | | |
| STATE OF OREGON | ) | |
| | ) | ss. |
| County of Klamath | ) | |

I, GLENN D. RAMIREZ, being first duly sworn on oath, depose and say:

I was admitted to the Bar of the State of Oregon in 1952, and have been engaged in private practice since said time to the present. I have paid the required

Bar dues and the contributions to the clients' security fund as required by the Oregon State Bar. Prior to the establishment of the Oregon State Bar Professional Liability Fund (FUND), I carried malpractice insurance on which the annual premium was less than $500.00 per year. Since the commencement of the Fund operations, the premiums started at $450.00 a year and has escalated to $2,500.00 a year, in addition to the Bar dues and contributions to the clients' security fund. That I paid the premium under protest.

2. The defendants occupy offices a the same address in the city of Lake Oswego, Clackamas County, Oregon.

3. ORS 9.080 and its passage by the Oregon State Legislature was largely influenced by the Oregon State Bar and individuals acting on its behalf.

4. The 1977 Board of Bar Governors' Resolution was passed by the influence of the same group of individuals that influenced the Oregon State Legislature in passing ORS 9.080. This was based on a finding that 40% of Oregon lawyers did not have malpractice insurance, no findings of losses to public was made.

5. From the initial history of the Fund, it appears that the Fund had no reserves from which to pay for legal malpractice and was in fact procuring insurance from other companies by the use of the initial premiums required, using the excess to build up a reserve, and that initially the amounts charged were comparble with private insurance premiums. Instead of purchasing insurance, I was purchasing protection from the Fund in that it was necessary to pay such protection to remain a member of the Oregon State Bar and to be able to continue practice. The Bar solicited opinions from the Courts and public officials as to the legality of such protection.

6. The protection provided by the Fund is to the members of the Bar and not to the public in that an attorney must be insured whether or not he has injured clients, and injured clients can only recover if they follow the rules of a policy of which they had no

notice. If a client makes a claim after an attorney has discontinued practice, there is no protection even though there was coverage when the attorney performed. Cantwell v. Estate of Goakey and Coe, and Fund, garnisher, CA A36657, SC S32843

7. Due to the high cost of the premiums charged by the Funds, I and other attorneys are required to charge their clients more to offset said costs, denying subtstantial members of the public legal assistance, and covering the rest of the attorneys who take more than they can handle at my expense.

8. In 1985 and 1986, I had occasion to present a claim against the Fund for the negligent actions of two attorneys, O. W. Goakey and Hal F. Coe, who were insured by the Fund and against whom a judgment had been obtained by Lee and Gloria Cantwell. This claim was in the form of a garnishment and demand for payment. A judgment had been taken against these two attorneys and entered in the favor of the Cantwells for $24,194.00 with interest of $9,140.00, plus interest, and costs of $221.95. However, instead of paying said liability as required by the law and the insurance coverage, the Fund filed a complaint with the Oregon State Bar, attempting to charge misconduct on my part for asserting the claim by appointing a representative for the estate of the deceased, O. W. Goakey, to have an entity against whom a judgment could be taken after the Fund and widow of the deceased had refused to either set up the estate or represent the estate after it was established. Thereafter in argument before the Oregon Court of Appeals, the attorney representing the Fund argued that they had sought and obtained the opinions of judges of both the Court of Appeals and Oregon Supreme Court, specifically suggesting that the Chief Justices of both Courts as well as those of other judges and officials had privately approved the interpretation that the Fund was seeking to deny the Cantwells' claim. The Court of Appeals and the Supreme Court denied the appeal and review of the Cantwell's without opinion.

9. I believe ORS 9.080 2a in unconstitutional in that it permits the defendants to place a restric-

tion on free spirit by permitting them to make an unlawful charge for the exercise thereof by me as an attorney. It is in restraint of trade in that I am required to buy insurance (protection) from them and the proceeds of such unlawful collections create a potential for unlawful influence of public and judicial officials so as to constitute racketeering under RICO 18 USCA 1962. It is money taken by illegal process without due process in law and constitutes an attempt by the Oregon State Bar to set up an illegal industry to collect monies under the guise and title of insurance premiums and set a legal malpractice insurance monopoly at expense of plaintiff.

10. The Fund's annual assessment has caused many Oregon lawyers to resign, withdraw or quit the law thereby making them ineligible to practice law in Oregon, which unlawfully reduces competition and my business.

11. That my practice and the general practice of law affect persons in interstate commerce in the United States.

I make this affidavit in opposition to defendants' motion for summary judgment.

/s/Glenn D. Ramirez
GLENN D. RAMIREZ

SUBSCRIBED AND SWORN to before me on MARCH 3, 1988.

/s/Vivienne I. Hustead
Notary Public Oregon
My Commission Expires 3-14-89

APPENDIX C

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**No. 87-3996**

**D.C. No. 87-196-LE**

**FRED HASS,**
**Plaintiff-Appellant,**

**v.**

**OREGON STATE BAR,**

**Defendant-Appellee.**

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**Appeal from the United States District Court**
**for the District of Oregon**
**George Juba, U.S. Magistrate, Presiding**

**Argued and Submitted**
**June 12, 1988—Portland, Oregon**

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**[Filed August 30, 1989]**

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**OPINION**

**BEFORE: GOODWIN, ALARCON and FERGUSON**
**Circuit Judges**

**Opinion by Judge Alarcon; Dissent by Judge Ferguson**

## OPINION

ALARCON, Circuit Judge:

### I. INTRODUCTION

Defendant-Appellee Oregon State Bar (Bar) passed a resolution requiring all active Oregon-based attorneys to purchase primary malpractice insurance from the Bar. Plaintiff-Appellant Fred Hass (Hass), a member in good standing of the Bar, contends that the Bar's insurance requirement violates both the Sherman Antitrust Act, 15 U.S.C. Sections 1, 2, (1982) and the commerce clause, U.S. Const. art. I, Section 8, cl. 3. The following issues are presented: (1) whether the Bar's insurance requirement is immune from challenge under the Sherman Act by virtue of the state action exemption or by virtue of the exemption for the business of insurance contained in the McCarran-Ferguson Act, 15 U.S.C. Sections 1011-1015 (1982); and (2) whether the Bar's insurance requirement violates the commerce clause.

We find it unnecessary to discuss the McCarran-Ferguson Act because we conclude that the Bar's insurance requirement falls within the state action exemption to the Sherman Act. We also conclude that the requirement does not violate the commerce clause.

### II. PERTINENT FACTS

The Bar is a public corporation and an instrumentality of the judicial department of the government of the State of Oregon. Or. Rev. Stat. Section 9.010 (1987). The Bar is governed by a Board of Governors (Board). *Id.* Section 9.025. The legislature has expressly granted the Board "authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon [hereinafter "Oregon-based attorneys"] to carry professional liability insurance...." *Id.* Section 9.080(2)(a). The legislature has further empowered the Board, "either by itself or in

conjunction with other bar organizations, to do whatever is necessary and convenient to implement" its authority to require Oregon-based attorneys to carry professional liability insurance. *Id.*

The legislature has granted the Board "authority to own, organize and sponsor any insurance organization authorized under the laws of the State of Oregon and to establish a lawyer's professional liability fund." *Id.* The Board is authorized to "assess each [Oregon-based attorney] ... for contributions to such fund ...." *Id.* The Board is further authorized "to establish definitions of coverage to be provided by such fund and to retain or employ legal counsel to represent such fund and defend and control the defense against any covered claim made against" an Oregon-based attorney. *Id.* The fund is required to pay, on behalf of such attorneys, "all sums as may be provided under such plan which any such [attorney] shall become legally obligated to pay as money damages because of any claim" of malpractice made against such attorney. *Id.*

In 1977, exercising its delegated authority, the Board passed a resolution, effective July 1, 1978, requiring all Oregon-based attorneys to carry malpractice coverage with aggregate limits of not less than $100,000.[1] The resolution also established the fund contemplated in Section 9.080(2)(a), which the Board denominated "the Oregon State Bar Professional Liability Fund" [hereinafter "the Fund"]. The resolution further provided that the required malpractice coverage "for all active members in the private practice of law, with the exception of patent attorneys, *shall* be obtained through" the Fund. (Emphasis added.)

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[1]The Board later raised the required aggregate limits to $300,000. For purposes of the present case, the amount of malpractice coverage mandated by the Board is not significant. Hass does not challenge the Board's requirement that he carry coverage of specified limits; he challenges only the requirement of such coverage be purchased from the Bar.

Pursuant to the foregoing resolution, Oregon-based attorneys have been required, since 1978, to participate in the Fund, and the Fund has provided such attorneys with legal malpractice coverage. An Oregon-based attorney's failure to participate in the Fund results in suspension from membership in the Bar.

On February 25, 1987, Hass instituted the present action. Hass' complaint alleged that in mandating attorney participation in the Fund, the Bar unlawfully monopolized the market for primary malpractice insurance, in violation of the Sherman Act, and violated the commerce clause of the U.S. Constitution.

The parties stipulated to the facts recited above and tried the case before the district court. The court did not adjudicate the Bar's liability under the Sherman Act, because the court ruled that the Bar's insurance requirement was immune from challenge under that Act by reason of the state action exemption. The district court also rejected Hass' claim that the Bar's practice violated the commerce clause. Hass now appeals from the final judgment entered in favor of the Bar.

The district court had jurisdiction over the subject matter under 28 U.S.C. Section 1331. We have jurisdiction over Hass' timely appeal from the final judgment under 28 U.S.C. Section 1291.

## III. DISCUSSION

### A. The State Action Exemption

The question presented is whether the Board's resolution requiring Oregon-based attorneys to purchase primary malpractice insurance[2] from the Bar (hereinafter

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[2]The Board's resolution does not prevent an attorney from purchasing *excess* malpractice coverage from the company of his or her choice. Hass challenges the Board's resolution that the primary layer of coverage must be purchased from the Bar.

"the mandatory participation provision") is immune from challenge under the federal antitrust laws by reason of the state action exemption. We review *de novo* the district court's ruling that the Bar is protected by the exemption. *Kern-Tulare Water Dist. v. City of Bakersfield*, 828 F.2d 514, 518 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1752 (1988).

Recognizing the principle of state sovereignty that underlies our federalist system of government, the Supreme Court has construed the Sherman Act not to apply to anticompetitive acts undertaken by a state in its sovereign capacity. *Parker v. Brown*, 317 U.S. 341, 350-51 (1943); *Kern-Tulare*, 828 F.2d at 518. A state is deemed to be acting in its sovereign capacity when it acts through its legislature, *Parker*, 317 U.S. at 350-51, or through its supreme court, acting in a legislative capacity, *Bates v. State Bar*, 433 U.S. 350, 359-60 (1977).

The mandatory participation provision challenged by Hass was not imposed directly by either the Oregon legislature or the Oregon Supreme Court acting in a legislative capacity. The provision was promulgated by the Bar, which is merely an instrumentality of the state judiciary. Thus, promulgation of the mandatory participation provision was not an act of the state in its sovereign capacity. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790-92 (1975) (activity of state bar in approving minimum-fee schedule was not activity of state acting as sovereign); *cf. Hoover v. Ronwin*, 466 U.S. 558, 572-73 (1984) (plurality) (where state supreme court appointed committee to administer bar examination but "retained strict supervisory powers and ultimate full authority" over committee, conduct of committee in grading examination was "in reality" that of state supreme court in its sovereign capacity).

Where, as here, the challenged activity "is not directly that of the [state] legislature or supreme court, but is carried out by others pursuant to state authorization," the court must closely analyze the activity to "ensure that the anticompetitive conduct of the State's representative was contemplated by the State." *Hoover*, 466 U.S. at 568

(footnote omitted).

The Supreme Court has formulated a two-part test to determine whether *Parker* immunity is available to non-sovereign entities engaged in alleged anticompetitive conduct pursuant to state authorization. First, the court must determine whether the challenged conduct has been undertaken "pursuant to a 'clearly articulated and affirmatively expressed state policy' to replace competition with regulation." *Hoover*, 466 U.S. at 569; *accord Patrick v. Burget*, ___ U.S. ___, 108 S.Ct. 1658, 1663 (1988); *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality)). Second, when the challenged conduct is that of a private party, the court must determine whether the conduct is "'actively supervised' by the State itself." *Midcal*, 445 U.S. at 105 (quoting *City of Lafayette*, 435 U.S. at 410). Whether the conduct of state agencies must also be "actively supervised" by the state is an open question. These requirements are discussed below.

1. *The Requirement of a Clearly Articulated and Affirmatively Expressed State Policy*

To determine whether the Bar has acted pursuant to a clearly articulated and affirmatively expressed state policy to replace competition with regulation in the field of primary legal malpractice coverage, we must examine the pertinent enabling legislation. If the statutory provisions "plainly show" that the legislature contemplated the sort of activity that is challenged, the "clear articulation" requirement has been satisfied. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 44 (1985); *see also Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 64 (1985) ("[a]s long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure," the "clear articulation" requirement is satisfied). The legislature will be deemed to have contemplated the challenged activity if the statutes confer "express authority to take action that *foreseeably* will result in anticompetitive effects." *Town of Hallie*, 471 U.S.

at 43 (emphasis added); *accord Kern-Tulare*, 828 F.2d at 518-19 ("So long as the restraint is a 'foreseeable result' which results logically from a broad grant of regulatory authority ..., the 'clear articulation' requirement is satisfied.").

The legislature need not detail or compel the specific anticompetitive actions at issue, nor need it explicitly state that it expects the regulated party "to engage in conduct that would have anticompetitive effects." *Town of Hallie*, 471 U.S. at 42. Likewise, the legislature need not expressly *permit* the challenged conduct. *Southern Motor Carriers*, 471 U.S. at 63-65.

On the other hand, "the requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the ... actions challenged as anticompetitive." *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 55 (1982). In *Community Communications*, a state constitutional provision granted cities "the full right of self-government in both local and municipal matters." *Id.* at 43. The Court held that this provision did not reflect a clearly articulated and affirmatively expressed state policy of replacing competition with regulation in the field of cable television, since the provision did not even address the subject of cable television. *Id.* at 55 ("[T]he term, 'granted,' necessarily implies an affirmative addressing of the subject by the State."). The Court explained: "A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought." *Id.*

A state agency is not free to "do as it pleases" simply because the state has left to the agency the task of selecting the course of action best suited to accomplishing the legislative policy. *See Central Iowa Refuse Systems v. Des Moines Metro. Solid Waste Agency*, 715 F.2d 419, 427 (8th Cir. 1983) (fact that state left municipality with "a range of options concerning how best to provide for sanitary disposal facilities" did not mean that state's position was one of "mere neutrality" concerning the

challenged municipal conduct), *cert. denied*, 471 U.S. 1003 (1985). As the Sixth Circuit has observed:

> An agency vested with broad discretionary powers will rarely find that only one course of action is available to accomplish its mission .... Our task, therefore, is to determine whether the restraints in question are a reasonable and foreseeable exercise of delegated powers within the scope of an agency's authority.

*Hybud Equipment Corp. v. City of Akron*, 742 F.2d 949, 960 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985) (footnote omitted).

Under the foregoing principles, we have found the "clear articulation" requirement satisfied by a variety of legislative schemes comparable to the scheme involved in the present case. *See, e.g., Kern-Tulare*, 828 F.2d at 519-20 (city's refusal to consent to water district's proposed sale of water that district had acquired from city was contemplated by legislature, where statutes empowered municipal corporations to contract for water, to purchase and operate public works to supply water to cities and their inhabitants, and to sell, lease, exchange, or otherwise transfer surplus water); *Grason Elec. Co. v. Sacramento Municipal Util. Dist.*, 770 F.2d 833, 837-38 (9th Cir. 1985) (public utility's alleged monopolization of markets for electrical distribution systems on private property and for street and outdoor lighting systems was pursuant to "clearly articulated" state policy, where statutes authorized utility to acquire, construct, own and operate works for supplying power, to fix its rates below cost, and to "do all things necessary or convenient to the full exercise of the powers" granted by statute), *cert. denied*, 474 U.S. 1103 (1986); *Springs Ambulance Serv., Inc. v. City of Rancho Mirage*, 745 F.2d 1270, 1273 (9th Cir. 1984) (cities' provision of free municipal ambulance service, which effectively excluded all private ambulance companies from market, was pursuant to "clearly articulated" state policy, where statute provided that "[t]he legislative body of a city may contract for ambulance service to serve the residents

of the city as convenience requires") (exclusion of private ambulance companies "was surely within the contemplation of the legislature" when it authorized cities to contract for such services).

Turning to the statutory scheme involved in the present case, the Oregon legislature has authorized the Bar to compel all Oregon-based attorneys to carry malpractice insurance. Or. Rev. Stat. Section 9.080(2)(a) (1987). Toward that end, the Bar is authorized "to own, organize and sponsor any insurance organization" and "to establish a lawyer's professional liability fund." *Id.* The legislature has further authorized the Bar to assess each Oregon-based attorney for contributions to the Fund and has stipulated that the Fund "shall pay" all covered sums for which an Oregon-based attorney becomes legally liable as a result of a malpractice claim. *Id.* The legislature provided that the Bar could act "*by itself* or in conjunction with other bar organization." *Id.* (emphasis added). Moreover, the legislature granted the Bar wide-ranging authority "to do whatever is necessary and convenient to implement this provision [for mandatory malpractice coverage]." *Id.*

This statutory scheme clearly evinces a legislative policy to supplant free market competition with regulation in the field of primary legal malpractice coverage, and to leave the effectuation of that policy to the Bar. Under these circumstances, the Bar's promulgation of its mandatory participation provision was a foreseeable consequence of the legislative grant of authority. *See Grason*, 770 F.2d at 837-38 (anticompetitive conduct was a foreseeable consequence of legislative grant of authority to own and operate works for supplying power and to "do all things necessary or convenient to the full exercise of the powers" granted by statute).

Hass argues that the statute does not clearly articulate and affirmatively express a state policy because the statute neither "refers to the requirement that attorneys purchase minimum legal malpractice insurance from Defendant" nor does it "direct Defendant to make such a requirement." As stated above, however, a statute

need not expressly mention the challenged anticompetitive activity to satisfy the requirement of clear articulation, *Town of Hallie*, 471 U.S. at 42, nor must the statute direct or compel the state agency to engage in the challenged activity, *Southern Motor Carriers*, 471 U.S. at 61.

For the foregoing reasons, we find that the mandatory participation provision satisfies the first part of the two-part test for protection under the state action exemption. The provision was promulgated pursuant to a clearly articulated and affirmatively expressed state policy to replace competition with regulation in the field of primary legal malpractice insurance.

2. *The Requirement of Active State Supervision*

The "active supervision" requirement of the state action exemption "stems from the recognition that '[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.'" *Patrick*, 108 S.Ct. at 1663 (quoting *Town of Hallie*, 471 U.S. at 47). The requirement ensures "that the state action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the STate, actually further state regulatory policies." *Id.*

When there is no danger that the party engaging in alleged anticompetitive activity is pursuing interests other than those of the state, there is no reason to require the party to satisfy the "active supervision" requirement. The state action exemption should be available to such a party whenever the first part of the two-part test is satisfied. Thus, for example, municipalities acting pursuant to clearly articulated and affirmatively expressed state policies are protected by the state action exemption, and no active supervision by the state need be shown. *Town of Hallie*, 471 U.S. at 47.

Whether a state agency, such as the Bar, must satisfy the "active supervision" requirement is an open

question. The Supreme Court has suggested, in dictum, that state agencies need *not* satisfy the requirement to qualify for the state action exemption. *See id.* at 46 n. 10 ("In cases in which the actor is a state agency, it is likely that active state supervision would ... not be required, although we do not here decide that issue."). We are aware of one circuit court opinion in which the question has been addressed. *See Hancock Industries v. Schaeffer*, 811 F.2d 225, 232 n. 4 (3d Cir. 1987). There, the court, albeit without extended discussion, excused both a political subdivision and an agency of the state from having to satisfy the "active supervision" requirement. *Id.* at 232 n. 4, 235-36. Our circuit has not addressed the question whether state agencies should be treated like political subdivisions for purposes of the state action exemption.

In the following passage, the Supreme Court explained why municipalities need not satisfy the "active supervision" requirement:

> [T]he requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy. In *Midcal*, we stated that the active state supervision requirement was necessary to prevent a State from circumventing the Sherman Act's proscriptions "by casting ... a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the

> municipality act pursuant to a clearly articulated state policy. Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.

*Town of Hallie*, 471 U.S. at 46-47 (citation omitted).

The foregoing rationale applies with equal force to the Bar. The Bar is a public corporation and an instrumentality of the judicial department of the State of Oregon. The Bar "at all times direct[s] its power to the advancement of the science of jurisprudence and the improvement of the administration of justice." Or. Rev. Stat. Section 9.080(1) (1987). The Bar is an agency of the state of Oregon organized to regulate the practice of law for the benefit of the public. *See Bates*, 433 U.S. at 361 ("[T]he regulation of the activities of the bar is at the core of the State's power to protect the public."). Toward this end, three of the fifteen members of the Board must be nonlawyer members of the public. Or. Rev. Stat. Section 9.025(1) (1987).

The records of the Bar, like those of other state agencies and municipalities, are open for public inspection. *Id.* Sections 9.010(1), 192.410-.505. The Bar's accounts and financial affairs, like those of all state agencies, are subject to periodic audits by the State Auditor. *Id.* Sections 9.010(1), 297.210-.230. The Board, like the governing body of other state agencies and municipalities, is required to give public notice of its meetings, and such meetings are open to the public. *Id* Sections 9.010(1), 297.210-.230. The Board, like the governing body of other state agencies and municipalities, is required to give public notice of its meetings, and such meetings are open to the public. *Id.* Sections 9.010(1), 192.610-.690. Members of the Board are public officials who must comply with the Code of Ethics enacted by the state legislature to guide the conduct of all public officials. *Id.* Sections 9.010(1), 244.010-.040. These requirements leave no doubt that the Bar is a public body, akin to a municipality for the

purposes of the state action exemption. *See Town of Hallie*, 471 U.S. at 45 (a municipality, unlike a private party, "is an arm of the State" and may be presumed to be acting in the public interest absent a contrary showing); *id.* at 45 n.9 ("municipal conduct is invariably more likely to be exposed to public scrutiny than is private conduct," in part because of mandatory disclosure regulations.).[3]

When the actor is a state agency subject to requirements such as those set forth above, just as when the actor is a municipality, "there is little or no danger that it is involved in a *private* ... arrangement." *Town of Hallie*, 471 U.S. at 47. This is particularly true where, as here, the actions are undertaken pursuant to a clearly articulated and affirmatively expressed state policy. *See* Part III(A)(1) *supra*. "Once it is clear that state authorization exists, there is no need to require the State to supervise actively the ... execution of what is a properly delegated function." *Town of Hallie*, 471 U.S. at 47.

Hass emphasizes that the Bar is an instrumentality of the state judiciary, rather than the state legislature. We do not believe this fact is relevant to the question of whether the Bar is a state agency. The Bar's status as a state agency depends on whether it is an instrumentality

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[3]The dissent states that the Oregon State Bar does not possess the attributes that are characteristic of a municipality because the bar's operation of the fund is not subject to public scrutiny. In particular, the dissent states that, "the actions of the Bar's Board of Governors cannot be checked by the electoral process, as no Board positions are filled by public election." Dissent at 25a. The dissent ignores the fact that only members of the Oregon State Bar are subject to the mandatory malpractice insurance requirement. Members of the Oregon State Bar have the right and responsibility to elect the members of the Board. ORS Section 9.030. Moreover, although members of the bar who are unhappy with the mandatory malpractice insurance assessment do not have the power to "direct, modify or rescind" any assessment, ORS Section 9.130(5), such members can petition for a recall of the members of the Board. ORS Section 9.050. Thus, those members of the public who are interested parties, the members of the Oregon State Bar, do have the ability to "check" the actions of the Board by the electoral process.

of the government of the state, not on whether it is supervised by one department of government rather than another.

A state bar operating as an instrumentality of the state supreme court is a state agency. *See Goldfarb*, 421 U.S. at 776 n. 2, 790. In *Goldfarb*, the Court refused to apply the state action exemption to the Virginia State Bar's enforcement of a minimum-fee schedule published by a county bar association. The Court acknowledged that the state bar was "a state agency by law," *id.* at 789-90, but held that the bar had not been acting pursuant to any state mandate. In a later discussion of the case, the Supreme Court read *Goldfarb* as establishing that "for purposes of the *Parker* doctrine, not every act of *a state agency* is that of the State as sovereign." *City of Lafayette*, 435 U.S. at 410 (emphasis added).

In *Bates*, the Court upheld application of the state action exemption to the Arizona State Bar's enforcement of a ban on advertising by attorneys. 433 U.S. at 363. The Arizona State Bar, like the Oregon State Bar, was an instrumentality of the state supreme court. *Id.* at 353 n.3, 361. The Court later observed that *Bates*, too, "involved the actions of a state agency." *City of Lafayette*, 435 U.S. at 410.

In the present case, the Oregon legislature has expressly designated the Bar as the instrumentality through which the legislature will implement its policies concerning primary legal malpractice insurance. The legislature has authorized the Bar to operate a legal malpractice insurance fund, to assess all Oregon-based attorneys for contributions to that fund, and to do whatever is "necessary and convenient" to ensure that all such attorneys carry the prescribed level of insurance. Under these circumstances, the Bar is clearly an agent of the legislature for the purposes of administering the malpractice insurance program, notwithstanding that it functions as an agent of the state supreme court for other purposes, such as bar admissions. Because we hold that state agencies need not demonstrate that their activities are "actively supervised" by the state, we find it

unnecessary to determine whether, or to what extent, the Bar's administration of the insurance program is overseen by either the state legislature or the state supreme court.

For the foregoing reasons, we hold that the Bar, as an agency of the State of Oregon, need not satisfy the "active supervision" requirement to qualify for protection under the state action exemption. As long as the Bar acts pursuant to a clearly articulated and affirmatively expressed state policy, it is protected. Because, as discussed above, the Bar has acted pursuant to such a policy in this case, the Bar's conduct is immune from challenge under the federal antitrust laws.[4]

B. The Commerce Clause

The district court held that the mandatory participation provision of the Bar's resolution did not exceed the scope of permissible state regulation under the commerce clause. The court's ruling was a matter of law, which we review *de novo*. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

The commerce clause provides: "The Congress shall have Power ... To regulate Commerce ... among the several States." U.S. Const. art. I, Section 8, cl. 3. The clause has been interpreted "not only as an authorization for congressional action, but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979) (footnote omitted). A state statute triggers scrutiny

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[4]Our holding is based on the characteristics of the Oregon State Bar and the particular statutory scheme at issue in the present case. We do not hold that all state bars are protected under the state action exemption to the federal antitrust laws. The dissent's fear that our holding will clothe other state bars in state action immunity is unfounded. *See* Dissent at 26a-27a. Our finding that the Oregon Bar is a state agency does not automatically clothe the bar with state action immunity. As discussed, the clear articulation requirement must be met first.

under the commerce clause in either of two situations: (1) when the statute "affirmatively discriminates," either on its face or in practical effect, against transactions in interstate commerce, or (2) when the statute regulates evenhandedly but incidentally burdens interstate transactions. *Maine v. Taylor*, 477 U.S. 131, 138 (1986). Statutes of the first type are subject to demanding scrutiny and will be upheld only if the state demonstrates "both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Id.* (quoting *Hughes*, 441 U.S. at 336). Statutes of the second type, on the other hand, will be upheld unless "the burdens they impose on interstate trade are 'clearly excessive in relation to the putative local benefits,' ...." *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

The mandatory participation provision of the Bar's resolution clearly falls within the second category described above. The resolution provides "[t]hat such professional liability coverage [as is required by the resolution] for all active members in the private practice of law, ... shall be obtained through the Oregon State Bar Professional Liability Fund." The resolution does not affirmatively discriminate against interstate insurance transactions on its face; nor does it have such an effect. In-state and out-of-state insurance companies are burdened in exactly the same way—all are effectively prevented from competing with the Bar to provide primary malpractice coverage. *See CTS Corp. v. Dynamics Corp. of America*, U.S., 107 S. Ct. 1637, 1648-49 (1987) (state statute regulating takeovers did not discriminate against interstate commerce; it "has the same effects on tender offers whether or not the offeror is a domiciliary or resident" of the state); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619 (1981) (no discrimination where severance tax on mineral production in the state was imposed without "any distinction between in-state and out-of-state consumers"). This is *not* a case in which the challenged regulation operates to place out-of-state providers at a competitive disadvantage. *Cf. Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350-51 (1977) (statute, although evenhanded on its face,

had effect of raising costs of out-of-state sellers while leaving those of local sellers unaffected). Here, all providers—whether local or out-of-state—are equally disadvantaged vis a vis the Bar.

The challenged provision in this case, thus, regulates evenhandedly. If it burdens interstate commerce at all, it does so only incidentally. The provision must be upheld, therefore, unless the burden it imposes on such commerce is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. Whether the burden is "clearly excessive" depends on "the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

Assuming *arguendo* that the mandatory participation provision burdens interstate commerce, which Hass has not demonstrated, that burden is not excessive in light of the substantial state interest in ensuring that Oregon-based attorneys are able to satisfy meritorious malpractice claims. Hass concedes, as he must, that "[t]he public should be protected from attorney malpractice." He maintains, however, that the Bar's resolution does not clearly further this important goal.

Oregon's legislative scheme addresses a patent failure in the unregulated market for legal malpractice insurance. The parties have stipulated to the fact that immediately prior to the commencement of the Bar's mandatory malpractice program, approximately 35% of the attorneys in the private practice in Oregon were without any legal malpractice insurance coverage. To correct this hazard to the public, the legislature authorized the Bar to do "whatever is necessary or convenient" to ensure that Oregon-based attorneys are covered by malpractice insurance. Included within the legislative grant of authority was the power to own and operate a fund to be used in satisfying the malpractice liability of Oregon-based attorneys.

The mandatory participation provision furthers the state's interest in ensuring universal malpractice coverage in at least two ways. First, it provides a convenient means

of monitoring attorney compliance with the requirement that primary malpractice coverage be obtained. Since the Bar itself collects the assessments and provides the coverage, there is little chance that an attorney will be able to evade the requirement.

Second, by maximizing the number of participants in the liability Fund, the Bar is able to provide coverage to attorneys who cannot afford to purchase coverage on the open market, or who are able to obtain coverage only from companies that are financially unstable. *See Feinstein v. Nettleship Co.*, 714 F.2d 928, 932 (9th Cir. 1983) (medical association's designation of single insurance broker for all its members "assure[d] coverage for certain high-risk specialties" by "spread[ing] risk across a wide area"), *cert. denied*, 466 U.S. 972 (1984). "If competition is permitted in risk selection the socially undesirable consequences may be either that those most at risk cannot obtain insurance at all, or that the solvency of companies which wind up insuring them will be impaired." *Owens v. Aetna Life & Cas. Co.*, 654 F.2d 218, 223 (3d Cir.), *cert. denied*, 454 U.S. 1092 (1981). By mandating participation in its Fund, the Bar maximizes the pool of insureds, spreading risk across a wide area. This risk spreading promotes the financial viability of the Fund. Were private carriers permitted to write coverage for selected practitioners, the Fund would be left to insure attorneys who were denied coverage by the private carriers, or who could not afford to buy coverage from such carriers. The Fund would be forced to underwrite an adverse selection of lawyers unacceptable to private carriers. The result would likely be assessments so high that many of these lawyers would not be able to afford the assessments and would be forced to discontinue the practice of law. The Bar is able to offer coverage at affordable rates to all attorneys by mandating that all attorneys participate in the Fund. The mandatory participation provision, therefore, furthers the state's interest in protecting the public from the malpractice of every attorney.

In summary, the Bar's mandatory participation provision does not affirmatively discriminate against interstate commerce, either on its face or in its practical

effect. To the extent it incidentally burdens such commerce (and Hass has not demonstrated such a burden), that impact is not excessive, in light of the fact that the provision directly and substantially furthers the state's important interest in ensuring that all Oregon-based attorneys have insurance against liability for malpractice.

## IV. CONCLUSION

We AFFIRM the district court's judgment for the Bar on Hass' antitrust claims. The activity at issue is immune from challenge under the Sherman Act by reason of the state action exemption because the activity was undertaken pursuant to a clearly articulated and affirmatively expressed state policy. We hold that the Bar, like a municipality, need not show that the activity was actively supervised by the state.

We also AFFIRM the district court's judgment for the Bar on Hass' commerce clause claim. The challenged provision regulates a local matter in which the state has a strong interest, and the provision does not impose an excessive burden, if any, on interstate commerce.

FERGUSON, Circuit Judge, dissenting:

I disagree with the majority's conclusion that the Oregon State Bar's insurance-related activities need not satisfy the active supervision requirement for state action antitrust immunity, and respectfully dissent. Furthermore, as there is no active supervision of the Bar's administration of the Professional Liability Fund, and because the Fund is outside the reach of the McCarran-Ferguson exemption to the antitrust laws, I would reverse the district court judgment.

I.

Grounded in the principles of federalism and state sovereignty, *Parker v. Brown*, 317 U.S. 341, 351 (1943), held that the Sherman Act was not intended "to restrain state action or official action directed by the state." Thus, when a state directly regulates its domestic commerce in a sovereign capacity, any resulting anticompetitive effects receive state action immunity from federal antitrust liability. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 572-73 (1984) (state supreme court acting as sovereign when acting in a legislative capacity); *Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977) (same); *Parker*, 317 U.S. at 350-52 (state legislature as sovereign). *Parker* also emphasized, however, that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351. While a state remains free to delegate regulatory authority to nonsovereign entities, "closer analysis is required" to ensure that such organizations receive state action immunity only when their anticompetitive actions further a demonstrated state commitment to supplant competition with regulation. *Hoover*, 466 U.S. at 568. Toward this end, the Supreme Court established the "clear articulation" and "active supervision" requirements for *Parker* immunity to determine whether the anticompetitive conduct of nonsovereigns should be adjudged state action and thus shielded from federal

antitrust liability. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

Since the majority concludes, as they must, that the Oregon State Bar (Bar) does not enjoy sovereign status, whether the Bar's insurance-related activities can be immunized from antitrust liability turns on the extent to which their activities comport with the dual requirements for *Parker* immunity. The Bar's creation and operation of the Professional Liability Fund (Fund) meets the "clear articulation" requirement. Analysis of the legislative history of Or. Rev. Stat. (ORS) Section 9.080 shows that the Oregon state legislature clearly sanctioned the creation of a mandatory malpractice liability fund when it delegated rulemaking authority to the Bar. *See Hearings on S. 190 Before the Senate Judiciary Comm.*, April 6, 1977 (statement of Paul J. O'Hollaren, Oregon State Bar) [hereinafter *Senate Hearings*]; *Hearings on S. 190 Before the House Comm. on Business & Consumer Affairs*, May 19, 1977 (statements of Senator Jernstedt and O'Hollaren).

Just as clearly, however, the Bar's operation of the Fund is not actively supervised by state authorities. The majority glosses over this lack of Fund supervision by holding that the Bar, by virtue of its status as a "state agency," need not satisfy this second requirement for *Parker* immunity. Because such a holding not only fails to address the nature of the organized bar, but also undermines the federalism principles embodied in *Parker*, I would hold that the Bar's operation of the Fund must be actively supervised by the state in order to invoke state action immunity from federal antitrust liability.

A.

At the heart of the active supervision requirement lies a concern for the political sufficiency of state economic regulatory decision. Based largely on the presumption that governmental bodies such as branches of state government, *see, e.g., Hoover*, 466 U.S. at 573 (state supreme court); *Parker*, 317 U.S. at 351 (state legislature), and political subdivisions, *Hallie v. Eau Claire*, 471 U.S. 34, 46 (1985)

(municipalities), regulate in the public interest, federalism counsels deference to their anticompetitive decisions. We justify this deference to a state's economic choices, however anticompetitive their effects, with the understanding that they were made by publicly accountable state officials. *See Hallie*, 471 U.S. at 45 & n.9 (municipal sewage regulations not required to meet active supervision requirement because actions of municipal officers checked by mandatory disclosure regulations and electoral process); *Hoover*, 466 U.S. at 599 (Stevens, J., dissenting) (antitrust laws "simply require that decisions to displace the free market be made overtly by public officials subject to public accountability"); *see also New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (state restrictions on location of automobile dealerships accorded state action immunity since program included public hearings when automobile franchisees protested placement of competing dealerships); *Parker*, 317 U.S. at 352 (state agricultural commission approval of collective pricing by raisin cartels preceded by public hearings); Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 Cal. L. Rev. 227, 249-250 (1987) (active state supervision requirement promotes citizen participation value of federalism).

The same aura of public accountability does not accompany the regulatory decisions of private parties. Unlike a public actor, "there is a real danger that ... [a private party] is acting to further his own interests, rather than the governmental interests of the State." *Hallie*, 471 U.S. at 47; *accord Patrick v. Burget*, 108 S. Ct. 1658, 1663 (1988). Thus, the active supervision requirement ensures that those exercising private delegations of regulatory authority do not forsake the public goals of a state's economic policy in favor of their own private regulatory agendas. *See Patrick*, 108 S. Ct. at 1663 (absent supervision "there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests"). State supervision of delegated authority prevents states from frustrating the national policy of marketplace competition by casting a "gauzy cloak of state involvement" over what are essentially private restraints on competition. *Midcal*,

445 U.S. at 106; *see also 324 Liquor Corp. v. Duffy*, 107 S. Ct. 720, 726 (1987); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 57 (1985).

The majority's conclusion that the Bar need not satisfy the active supervision requirements blurs, if not eliminates, this logical distinction between public and private economic regulation. While the majority appears content to paint the Bar as a state agency or other form of public body "akin to a municipality for purposes of the state action exemption,"[1] it offers only a partially completed portrait. The Bar's private interests in the very field in which it regulates—professional malpractice insurance—coupled with the lack of public accountability for its Fund-related activities, reveals that the Bar presents a poor candidate for exemption from the active supervision requirement.

Conspicuously absent from the majority's discussion is any acknowledgment of the potential for abuse when a state delegates regulatory authority to an organization, such as the Bar, which brings its own set of economic interests to bear on the regulated field. Experience has shown that, best intentions aside, the organized bar may seek to protect the interests of its members despite arguably conflicting public interests. Dissenting in *Hoover*, 466 U.S. at 585, Justice Stevens voiced this concern: "When [state] ... authority is delegated to those with a stake in the competitive conditions within the market, there is a real risk that public power will be exercised for private benefit."

Perhaps in recognition of this economic realty, the

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[1]Apparently the majority cannot decide on the institutional pedigree of the Bar under Oregon law as it alternatively characterizes the Bar as "an instrumentality of the judicial department of the State of Oregon," "a public body[] akin to a municipality," "a state agency," and "an agent of the legislature for the purposes of administering [the Fund]." The majority's inability to concretely define the organizational nature of the Bar highlights its hybrid nature, and, thus, serves to underscore the need for closer review of the majority's portrayal of the character of the Bar.

Supreme Court has never authorized a state bar to exercise independent authority over regulation of the legal profession. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Court refused to extend *Parker* state action immunity to fee schedules enforced by the Virginia State Bar, an administrative agency by state law, when the state's Supreme Court Rules did not require such anticompetitive fee restraints. "The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." *Id.* at 791 (citation and footnote omitted).

While the two remaining Supreme Court decisions addressing the authority of state bar organizations to regulate the legal profession ultimately held that the challenged conduct was immune from antitrust attack, each based this holding on the state bar's *lack* of independent regulatory authority. In affirming the disputed disciplinary rules restricting legal advertising in *Bates v. State Bar of Arizona*, 433 U.S. 350, 361 (1977), the Court noted that the state bar's role in disciplinary enforcement consisted solely of acting "as the agent of the [state supreme] court under its continuous supervision." Given the extensive official oversight over the state bar's enforcement responsibilities, the *Bates* Court had no reason to fear aggrandizement of private economic interests: Moreover ... the [disciplinary] rules are subject to pointed reexamination by the policymaker—the Arizona Supreme Court—in enforcement proceedings. Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active. *Id.* at 362.

Finally, in *Hoover v. Ronwin*, 466 U.S. 558 (1984), the Supreme Court upheld Arizona's bar admission procedures which permitted a state bar committee to compile and grade bar examinations, but reserved the final admission decision for the Arizona Supreme Court. Applying *Bates*, the *Hoover* Court found it persuasive that while the Arizona Supreme Court delegated some

discretionary authority to the committee, it nevertheless "retained strict supervisory powers and ultimate full authority over [the committee's] ... actions." *Id.* at 572. Taken together, *Goldfarb*, *Bates*, and *Hoover* thus reinforce the proposition that when independent regulatory authority is delegated to a state bar, particular care must be taken to ensure that public authority is not being used to further private economic agendas.

While the potential for self-interested economic behavior may not be sufficient in and of itself to trigger the active supervision requirement, when viewed in light of the Bar's lack of publicly accountable decisionmaking, there is a need for state oversight. The majority likens the Bar to a municipality or state agency in terms of providing opportunities for public participation in regulatory decisions, but closer analysis reveals the flaws in both of these analogies.

Acknowledging the public nature of municipalities, *Hallie v. Eau Claire*, 471 U.S. 34 (1985), concluded that the active supervision requirement should not be imposed when the regulatory actor was a municipality. *Hallie* premised this conclusion on the common sense view that a municipality's position in the public eye provides some protection against antitrust abuses. *Id.* at 45 & n.9. Yet few of the "public" features the Court found persuasive in *Hallie* are present in this case. While municipal regulatory decisionmaking is usually preceded by public hearings or other mechanisms for airing opinions or concerns, *see* ORS Section 221.240 (contested rate filings by municipally regulated public utilities subject to voter ratification), the Bar's operations of the Fund is subject to neither mandatory disclosure regulations, ORS Section 9.010(1); ORS Sections 244.050-.201, nor rate hearings for aggrieved parties, ORS Section 9.080(2)(a); ORS Section 737.340. Moreover, the actions of the Bar's Board of Governors cannot be checked by the electoral process, as no Board positions are filled by public election. *See* ORS Section 9.025(1). In short, rather than being characterized by accessibility and openness, the Bar's operation of the Fund suggests insularity. Under such circumstances, *Hallie*'s presumption of conduct in the public interest does

not apply to the Bar.

The majority's attempt to characterize the Bar as a "state agency" proves no more persuasive in furthering its position that the public aspects of the Bar's activities make the active supervision requirement inapplicable.[2] The Bar's regulatory authority is simply not constrained by the same degree of public scrutiny typically governing other state agencies. While state agencies may not operate as democratically as municipal governments, they usually provide some opportunity for public participation in regulatory decisions. *See, e.g., Southern Motor Carriers*, 471 U.S. at 50-51; *New Motor Vehicle Bd.*, 439 U.S. at 103; *Parker*, 317 U.S. at 346-47. To ensure public accountability for regulatory decisions, many state administrative agencies, including those in Oregon, allow for public input on proposed rules, provide hearings for interested parties, and undergo regular budgetary review. *See, e.g.*, ORS Sections 182.010-.105 (general rules governing state agencies), 291.015-.028 (budgetary review of state agencies). The Bar, however, is not required to submit *any* of its Fund decisions for public scrutiny. Requiring active supervision of the Bar would serve the salutary purpose of ensuring that the public, either directly or through publicly accountable state officials, would have an opportunity to participate in a delegated regulatory decisionmaking process of significant public importance.

While the majority purports to narrow its holding by basing it on the "characteristics of the Oregon State Bar and the particular statutory scheme at issue in the present case," the majority alludes to no particular organizational aspects of the Bar that are not shared by the other integrated state bars. In fact, the scope of authority enjoyed by many state bars bears a striking resemblance to that found in the Oregon bar scheme prior to the creation of the Fund. *See, e.g.*, Ala. Code Section 34-3-40 to -43

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[2]At no point does the Oregon statutory scheme identify the Bar as a state agency. However, for the purposes of argument, I accept the majority's characterization of the Bar as a state agency. In the final analysis, however, I do not believe that this or any other organizational label proves dispositive on the issue of the Bar's antitrust liability.

(1988); Alaska Stat. Section 08.08.010-.100 (1987); Cal. Bus. & Prof. Code Sections 6000-76 (1974 & Supp. 1989); Idaho Code Section 3-401 to -420 (1979 & Supp. 1988); Mich. Stat. Ann. Section 27A.901 - .910 (1986); Nev. Sup. Ct. R. 49-75 (1988); Tex. Gov't Code Ann., tit. 2, subtitle G, app. arts. I-XIII (1988). Accordingly, notwithstanding the majority's best efforts to limit the scope of its holding, there is little doubt that, under its approach, more state bars than simply Oregon's will be clothed in state action immunity.

B.

Having concluded that the Bar need not satisfy the active supervision requirement to qualify for state action immunity from federal antitrust liability, the majority specifically declined the reach the issue of "whether, or to what extent, the Bar's administration of the [Fund] ... is overseen by either the state legislature or the state supreme court." Only a brief review of the statutory scheme at issue is necessary, however, to conclude that no state actor supervises the Bar's operation of the Fund. ORS 9.080 provides no avenues for the Oregon state legislature or supreme court, acting in their sovereign capacities, to "have and exercise power to review [the Bar's] particular anticompetitive acts ... and disapprove those that fail to accord with state policy." *Patrick*, 108 S. Ct. at 1663; *see also 324 Liquor Corp.*, 107 S. Ct. at 725-26. Nor does the Director of the Oregon Department of Insurance possess any regulatory authority over the Fund. *See* ORS Section 9.080(2)(a). While active members of the Bar may generally modify or rescind Bar decisions, they carry no such authority with respect to Fund assessments. *Compare* ORS Section 9.130(1) *with* ORS Section 9.130(5). Rather, like the state wine pricing system denounced in *Midcal*, "the State simply authorizes price setting and enforces the [established] prices ... it does not monitor market conditions or engage in any 'pointed reexamination' of the program." *Id.* at 105-06 (footnote omitted).

Indeed, the only two entities with direct authority over Fund operations are the Bar's Board of Governors and

the Board of Directors of the Fund, *see* ORS 9.080(1); Resolution of the Oregon State Bar Board of Governors (effective July 1, 1978), paragraphs 4-6 [hereinafter Board of Governors' Resolution], each of whose individual board members consist largely, if not entirely, of attorneys.[3] While active state supervision may include oversight by a regulatory authority such as a state administrative agency, *see, e.g., Southern Motor Carriers*, 471 U.S. at 66 (1985), it would be a case of fox-watching-the-henhouse to conclude that these two Boards could provide meaningful supervision over the Fund. Thus, because no state actor in Oregon actively supervises the Bar's operation of the Fund, I would hold that *Parker*'s state action doctrine does not protect the insurance-related activities challenged in this case from the federal antitrust laws.

II.

The Bar claims that even if it does not qualify for state action immunity from the antitrust laws, Hass' suit still must be dismissed as the Fund falls within the McCarran-Ferguson Act's exemption to the Sherman and Clayton Acts. This contention also lacks merit.

The McCarran-Ferguson Act (the Act) was enacted in 1945 in response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which held that insurance transactions were subject to congressional regulation in general, and the strictures of the antitrust laws in particular. The Act was designed to turn the clock back to the state of insurance regulation before *South-Eastern Underwriters*, to assure that to activities of insurance companies in dealing with their policyholders would remain subject to state regulation. *See S.E.C. v. National Securities, Inc.*, 393 U.S. 453, 458-59 (1969). Congress, convinced that intra-industry cooperation was essential to maintain the

[3]Twelve of the fifteen members of the Board of Governors must be active members of the Oregon State Bar, ORS Section 9.025(1), while all seven of the Fund's Board of Director positions are restricted to active members of the Bar. Board of Governors' Resolution, paragraph 4.

financial stability of the insurance industry, was particularly concerned with protecting the rate-making regulatory schemes of the individual states from the federal antitrust laws' prohibitions. *See Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979).

Under the Act a practice is exempt from the federal antitrust laws if it is (1) the "business of insurance," (2) regulated by state law, and (3) does not involve coercion, intimidation, or boycott.[4] *Feinstein v. Nettleship Co. of Los Angeles*, 714 F.2d 928, 931 (9th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984). *Klamath Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1284 (9th Cir.), *cert. denied*, 464 U.S. 822 (1983).

While a persuasive argument exists that the operation of the Fund qualifies as the business of

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[4]Section 2 of the McCarran-Ferguson Act provides that:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulation the business of insurance .... *Provided*, that ... the Sherman Act, and ... the Clayton Act, and ... the Federal Trade Commission Act ... shall be applicable to the business of insurance to the extent that such business is not regulated by state law.

15 U.S.C. Section 1012.

Section 3 of the Act provides, in pertinent part, that:

> Nothing contained in this act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

insurance under the Act, we need not reach a conclusion on the issue.[5] Even assuming the administration of the Fund does constitute the business of insurance, the Bar cannot invoke the McCarran-Ferguson exemption as the Bar's insurance-related activities are not "regulated" by state law under Section 2(b) of the Act and the Bar's rules concerning the operation of the Fund involve "coercion" within the meaning of Section 3(b) of the Act.

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[5]The Supreme Court has set forth three factors to consider in determining whether a challenged practice constitutes the business of insurance: (1) whether the practice has the effect of transferring or spreading a policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and insured; and (3) whether the practice is limited to entities within the insurance industry. *United States Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982). While the Supreme Court stated that "none of the criteria is determinative in itself," the Ninth Circuit's discussion of the factors has emphasized that the primary characteristic of the business of insurance is the transferring or spreading of risk. *See Feinstein*, 714 F.2d at 931; *Klamath-Lake*, 701 F.2d at 1285.

Applying these criteria to this case, it seems fairly clear that the Fund satisfies the first two factors. The legislative history of ORS Section 9.080 strongly suggests that one of the primary objectives in authorizing the Bar to require participation in the Fund was the minimization and spreading of risk. *See Senate Hearings* (testimony of Paul J. O'Hallaren). Additionally, the focus of Hass' challenge is the nature of the relationship between the insurer, the Bar, and the insured, Oregon attorneys. As for the third criterion, it is somewhat difficult to apply to this case since we are not faced with the insurer-third-party arrangements that the court was contemplating when it articulated this factor. *See Royal Drug*, 440 U.S. at 224; *Pireno*, 458 U.S. at 129. While one could argue that this factor should be interpreted as limiting the McCarran Act exemption to traditional entities in the insurance industry, such a proposition finds no support in the case law. As this court stated in *Klamath-Lake*, "[i]t is the business of insurance, not merely the business of traditional insurers, that activates the exemption." *Klamath-Lake*, 701 F.2d at 1286.

A.

The regulation requirement of the Act is contained in Section 2(b); this section, in relevant part, provides that the Sherman Act "shall be applicable to the business of insurance to the extent that such business is not regulated by state law." 15 U.S.C. Section 1012(b).

This circuit, along with a majority of other circuits, has held that as long as a general state regulatory scheme exists which possesses jurisdiction over the challenged practice, then the practice is regulated by state law within the meaning of the Act. *See Feinstein*, 714 F.2d at 933; *Addrist v. Equitable Life Assurance Society of the United States*, 503 F.2d 725, 728 (9th Cir.), *cert. denied*, 420 U.S. 929, *reh'g denied*, 421 U.S. 922 (1975). While the Oregon Insurance Code is precisely the type of state regulatory scheme that would satisfy the Act's regulation requirement, the Fund, as noted above, is expressly exempt from all requirements of the Insurance Code. *See* ORS Section 9.080(2)(a) ("any fund so established shall not be subject to the Insurance Code of the State of Oregon"). Since the Insurance Code does not possess jurisdiction over the Bar's challenged practice, it cannot satisfy the regulation requirement under the Act.

The Bar attempts to bring the Fund within the state regulation requirement by arguing that ORS Section 9.080, the statute which authorizes the creation of the Fund, constitutes state regulation within the meaning of the Act. To support its proposition, the Bar cites *California League of Independent Insurance Producers v. Aetna Casualty & Surety Co.*, 175 F. Supp. 857 (N.D. Cal. 1959), which held that when a state statute "generally permits or authorizes certain conduct on the part of the insurance companies," it regulates the business of insurance within the meaning of Section 2(b). *Id.* at 860. The district court reasoned that this interpretation of Section 2(b) followed naturally from the Supreme Court's holding in *F.T.C. v. National Casualty Co.*, 357 U.S. 560 (1958). In *National Casualty*, the Court determined that a state statute which generally prohibited unfair advertising within the insurance industry and authorized enforcement

through a scheme of administrative supervision satisfied the proviso in Section 2(b). *Id.* In so holding, the Court rejected the F.T.C.'s contention that because the general prohibitory legislation at issue had not "crystallized into administrative elaboration of [the] standards and applications in individual cases" it was too inchoate to constitute "regulation" within the meaning of the Act. *Id.* at 564-65.

While the Court's narrow holding in *National Casualty* is somewhat ambiguous, the district court in *California League* clearly erred in holding that general statutory authorization or permission constitutes state regulation under the Act. First, contrary to *California League*'s logic, the fact that a general *prohibitory* statute like the legislation at issue in *National Casualty* satisfies the regulation requirement in no way suggests that mere statutory *authorization* of a particular anticompetitive practice also constitutes "regulation." Second, and more importantly, *California League*'s pronouncement is contrary to the legislative history of Section 2(b). Senate debate on Section 2(b)'s regulation requirement is replete with commentary suggesting that the states could not, by enacting statutes authorizing or permitting certain practices, render such activity immune to the federal antitrust laws.[6] *See Crawford v. American Title Insurance*

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[6]Since the regulation proviso in Section 2(b) originated in conference, the Conference Committee Report on the McCarran-Ferguson Act did not address the issue, and the House of Representatives approved the bill without debate; the Senate debate is the only source of congressional intent concerning the term "regulated". *See* Carlson, *The Insurance Exemption from the Antitrust Laws*, 57 Tex. L. Rev. 1127, 1156 (1979) [hereinafter Carlson, *Insurance Exemption*].

On the first day of the debate, Senators McCarran and O'Mahoney repeatedly emphasized that only state legislation *regulating* insurance, not simply permissive state legislation, would satisfy Section 2(b). *See* 91 Cong. Rec. 1443-1444 (1945). At one point, Senator McCarran stated:

> During the 3-year moratorium, the States may, if they see fit to do so, *enact legislation for the purpose of*

*Co.*, 518 F.2d 217, 224 (5th Cir.), *reh'g denied*, 521 F.2d 814 (5th Cir. 1975) (Godbold, J., dissenting); *see also* Carlson, *Insurance Exemption* at 1156.

Finally, it is worth noting that while other courts have cited the *California League* language at issue to support a finding that Section 2(b)'s regulation requirement had been met, all such cases have in fact involved either some general regulatory insurance scheme or prohibitory legislation. *See e.g., Commander Leasing Co. v. Transamerica Title Insurance Co.*, 477 F.2d 77, 83 (10th Cir. 1973); *Ohio v. AFL-CIO v. The Insurance Rating Board*, 451 F.2d 1178, 1182-83 (6th Cir. 1971), *cert. denied*, 409 U.S. 917 (1972); *Crawford v. American Title Insurance*

> *regulation*. If they do enact such legislation, to the extent that they regulate they will have taken the business of insurance ... out from under the Sherman ..., the Clayton ..., and the other acts.

*Id.* at 1443 (emphasis added).

Later in the debate, Senator O'Mahoney, in response to Senator Pepper's concerns that Section 2(b)'s language was too generous to the states in that it provided an easy means to evade federal power over the insurance industry, asserted:

> I interpret ... ["to the extent not regulated by state law"] to be a clear statement that if the States do not regulate, the power of Congress to regulate is clearly enunciated. *I do not conceive this to be a grant of power to the States to authorize by permissive legislation obviously adverse combinations which would be against the public interest.*

*Id.* at 1444 (emphasis added).

Senator O'Mahoney's comments on the second day of the Senate debate that the bill only authorized the states to permit what would otherwise be Sherman Act violations if they created regulatory schemes akin to public-utility rate-setting mechanisms is yet another piece of evidence that Congress had more in mind than simply permissive legislation when it enacted Section 2(b). *See id.* at 1483.

*Co.*, 518 F.2d at 219. Thus, there is no case authority to support the Bar's contention that ORS Section 9.080 satisfies the Act's regulation requirement. Given that the Bar has not drawn our attention to any other statute or regulatory scheme which could satisfy the state regulation requirement, the Bar has failed to show that the Fund is regulated by state law as required by Section 2(b) of the Act.

B.

The Bar is also precluded from invoking the McCarran-Ferguson exemption on the grounds that the operation of the Fund amounts to coercion, and is thus outside the scope of this limited immunity to the antitrust laws.

Section 3(b) of the Act specifies that the antitrust exemption will not extend to "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation." 15 U.S.C. Section 1013(b). This provision applies to boycotts and coercive practices against policyholders as well as among insurance companies and agents. *See St. Paul Fire & Marine Ins. Co. v. Barry*, 433 U.S. 531 (1978); *Feinstein v. Nettleship Co. of Los Angeles*, 714 F.2d at 931. Pursuant to the Bar's regulations, all active members in the private practice of law, with the exception of patent attorneys, are required (1) to carry professional liability insurance and (2) to purchase such insurance from the Bar. *See* Board of Governors' Resolution, paragraphs 1-2. In other words, in order to practice law in the State of Oregon, private attorneys, including Hass, are not only compelled to carry insurance, but are forced to take their insurance business to one particular insurer—the Bar. The plain meaning of the term "coercion" is clearly implicated where, as here, an individual's ability to pursue her livelihood is conditioned upon her willingness to deal with one particular insurer, to the exclusion of all other potential insurers. Indeed, it is difficult to envision a more coercive practice than the one at issue in this case.

This court's analysis in *Feinstein v. Nettleship Co. of Los Angeles*, 714 F.2d 928 (9th Cir. 1983), lends considerable support to a finding that the Bar's regulations amount to coercion under Section 3(b). In *Feinstein*, a county medical association had entered into a contract with an insurance company to provide medical malpractice insurance to all of its members who desired to purchase such insurance. Plaintiff doctors claimed that the agreement between the association and the insurance company amounted to "boycott and coercion" under the Act since a doctor had to become a member of the county medical association in order to purchase insurance from the association's designated insurance company. *Feinstein*, 714 F.2d at 933. The court rejected the doctors' claim, relying almost entirely on the fact that the association was not forcing them to buy association-sponsored insurance, nor was it preventing them from dealing with other insurers. Indeed, as the court pointed out, several doctors in the association were insured by other companies. The court concluded that because the agreement "in no way limited the doctors' ability to deal with third parties, the agreement itself is not an agreement to boycott or coerce the plaintiffs to purchase defendant's insurance." *Id.*

Unlike the agreement in *Feinstein*, the Bar's insurance scheme *does* limit the insured's ability to deal with third-parties. By finding this lack of compulsion within the medical association's agreement dispositive, the *Feinstein* court implicitly recognized that an agreement or practice which does impose such a limitation on policyholders likely constitutes coercion within the meaning of the Act. It thus seems apparent that the requirement that attorneys purchase malpractice insurance from the Fund amounts to coercion under Section 3(b) and thus places the operation of the Fund beyond the reach of the McCarran-Ferguson exemption.

In light of the fact that the Bar can invoke neither the state action immunity doctrine nor the McCarran-Ferguson exemption for the business of insurance, I would reverse the district court's dismissal of Hass' action.

Supreme Court, U.S.
FILED
APR 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-1483

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

GLENN D. RAMIREZ,

Petitioner,

vs.

OREGON STATE BAR,
OREGON STATE BAR PROFESSIONAL LIABILITY FUND,

Respondents.

# PETITIONER'S REPLY BRIEF

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## TABLE OF AUTHORITY

Hass v. Oregon State Bar (1989)
Ninth Circuit Court of Appeal 1, A-24

The Respondents, in their Brief, have relied and quoted extensively from their recent case, Hass v. Oregon State Bar, and has submitted a copy of the Opinion as Appendix C to their Brief. This case involved a Complaint that the Plaintiff could get the insurance cheaper, if not required to buy it, from the Defendants. The Trial Magistrate and the Circuit Court of Appeals for the Ninth Circuit expanded this into an Anti-Trust issue and the United States Supreme Court denied certiorari.

The fact of jurisdiction cannot be collaterally challenged and the fact that Mr. Hass was prohibited by law from buying the insurance cheaper from another source under the facts which he alleged had been decided. However the constitutional issues presented in the instant case were not decided.

A copy of the Stipulation for decision in the Hass case is submitted herewith as Petitioner's Appendix D attached hereto.

The question is not whether or not Petitioner can get insurance at a cheaper price, but whether or not the government can curtail its regulation

under the United States Constitution by encumbering lawyers who would defend it with an unconstitutional insurance assessment.

## CONCLUSION

Because of the serious constitutional potential infringements caused by the requirement that private lawyers pay insurance assessments to the Bar to represent persons in seeking redress from the government for wrongs done to them, certiorari should be granted to decide or to remand for decision the constitutionality of the Bar insurance assessment permitted in Oregon under ORS 9.080. Later may be too late, and if not too late, would certainly aggravate damages sustained by the public, their attorneys, and in the final analysis, the Judiciary.

Dated this 30th day of April, 1990.

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DISTRICT OF OREGON
BY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FRED HASS,

Plaintiff,

v.

OREGON STATE BAR,

Defendant.

Civil No. 87-196-LE

STIPULATION

For the purpose of submitting all of the claims asserted in plaintiff's Complaint and the defenses tendered by the defendant's Answer to the court for adjudication, the parties hereby stipulate that for the purpose of this submission, the following facts are true.

1. In this action, plaintiff seeks declaratory and injunctive relief, which plaintiff claims is available under 28 USC §§ 2201, 2281, and 2284.

2. Plaintiff claims this Court has jurisdiction of



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plaintiff's First Claim for Relief [Interstate Commerce] by virtue of 28 USC §§ 1331, 2201, and 2281.

3. This Court has jurisdiction of plaintiff's Second Claim for Relief [Monopoly] pursuant to 15 USC § 26.

4. The plaintiff was admitted to practice law in the state of Oregon in 1981, is presently practicing in the city of Portland, Oregon, and has heretofore contributed to the Professional Liability Fund all assessments made by the defendant. Plaintiff is presently a member in good standing of the Oregon State Bar.

5. The defendant was and is a public corporation and an instrumentality of the Judicial Department of the state of Oregon. Defendant may sue and be sued.

6. Defendant's office and the office of its Executive Secretary are in the city of Lake Owego, Clackamas County, Oregon.

7. In 1977, the Legislative Assembly passed an Act, subsequently codified as ORS 9.080, which provides as follows:

> "(2)(a) the board [Board of Bar Governors] shall have the authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional liability insurance and shall be empowered, either by itself or in conjunction with other bar organizations, to do whatever is necessary and convenient to implement this provision, including the authority to own, organize and sponsor any insurance organization authorized under the laws of the State of Oregon and to establish a lawyers professional liability fund."

8. In 1977, the Board of Bar Governors passed a resolution



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providing in part as follows:

> "1. Effective July 1, 1978, all active members of the Oregon State Bar engaged in the private practice of law in Oregon shall carry professional liability coverage with aggregate limits of not less than $100,000.00 ... .
>
> "2. Such professional liability coverage for all active members engaged in the private practice of law in Oregon, except patent atorneys, shall be obtained through the Oregon State Bar Professional Liability Fund ... ."

9. Following said enactment and the adoption of said resolution, the defendant, through its Professional Liability Fund, commenced providing insurance coverage for legal malpractice to active members of the Oregon State Bar engaged in the private practice of law in the State of Oregon. Contemporaneously therewith, said members have been required to carry a minimum amount of coverage. The cost of said coverage is assessed by the Board of Directors of the Professional Liability Fund, approved by defendant, and paid to the Professional Liability Fund.

10. In each year following 1977, attorneys engaged in private practice in the State of Oregon have been required to contribute the amounts assessed, and the Professional Liability Fund has provided insurance for legal malpractice.

11. Plaintiff, together with all attorneys in private practice in Oregon, are required to participate in the Professional Liability Fund Plan. Failure to participate shall result in suspension from membership in the Bar pursuant to ORS 9.200.



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12. Plaintiff has made all contributions necessary to pay Professional Liability Fund assessments for each year plaintiff has been in private practice, and plaintiff is presently making said contributions on a quarterly basis.

13. In 1977, just prior to the time defendant's Professional Liability Fund Plan went into effect, approximately 35% of the attorneys in private practice in the State of Oregon were without any legal malpractice insurance coverage.

14. The administration and operation of the Professional Liability Fund is actively supervised by the defendant. Direction and supervision of the Professional Liability Fund is provided by a Board of Directors appointed by defendant, and directed by the defendant.

15. The Oregon State Bar Professional Liability Fund currently has in effect one minimum legal malpractice insurance plan, a copy of which is attached hereto.

16. If called to testify, plaintiff will testify to the facts set forth in his affidavit.

STIPULATED TO:

BLOOM & SPAULDING

Date: April 6 1978 By _____
Michael H. Bloom
Of Attorneys for Plaintiff

McEWEN, GISVOLD, RANKIN & STEWART

Date: April 6, 1978 By _____
Janice M. Stewart
Of Attorneys for Defendant



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# OREGON STATE BAR

## PROFESSIONAL LIABILITY FUND

## CLAIMS MADE PLAN

January 1, 1987

Oregon State Bar
Professional Liability Fund
Suite 200 — 1221 S.W. Yamhill Street
Portland, OR 97205

Telephone: (503) 224-4355
Toll Free 1-800-452-1639

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## INTERPRETATION OF THIS PLAN

The bracketed titles appearing throughout this Plan are not part of the Plan and should not be used as an aid in interpreting the Plan. The bracketed titles are intended simply as a guide to aid the reader in locating pertinent provisions.

In contrast, the discussions labeled "COMMENTS" following various provisions of the Plan are intended as aids in interpretation. These interpretive provisions add background information and provide additional considerations to be used in the interpretation and construction of the Plan.

Throughout this Plan:

(a) the words "YOU" and "YOUR" refer to the Named Party shown in the Declarations,

(b) the words "WE," "US" and "OUR" refer to the Professional Liability Fund of the Oregon State Bar,

(c) the words "COVERED PARTY" refer to any person or organization qualifying as such under Section II — WHO IS A COVERED PARTY, and

(d) the words "COVERED ACTIVITY" refer to conduct qualifying as such under Section III — WHAT IS A COVERED ACTIVITY.

Other words and phrases that appear in all capital letters have special meaning. Refer to Section IV — DEFINITIONS.

### COMMENTS

**History.** The Professional Liability Fund was originally created pursuant to enabling legislation empowering the Board of Governors of the Oregon State Bar to establish an indemnity system for attorneys. The object of this program was to provide mandatory coverage at minimum cost to attorneys while assuring the public that each attorney in private practice would have certain minimum levels of protection. The determination of the scope of the protection afforded was to be determined by the Board of Governors and/or its designee. See ORS 9.080(2)(a) and its legislative history. The PLF was empowered to do whatever was reasonable and necessary to achieve this objective. See, e.g., *Balderree v. OSB*, 301 Or 155, 719 P2d 1300 (1986). Pursuant to this authority, the PLF has adopted this Plan.

**Claims-made Form.** The Plan is a claims-made indemnity agreement similar in form to current plain language insurance policies. The Plan is a contractual agreement between the PLF and the individual attorney to whom it is issued.

**Plan Is Not an Adhesion Contract.** Traditionally, indemnity agreements have been subject to court interpretation construing all ambiguities against the author of the form. However, not all insurance contracts are treated as contracts of adhesion. For example, the Bankers Blanket Bond issued by

insurers to individual banks electing to purchase this coverage was developed through negotiations between banking industry representatives and representatives of the insurance industry. Courts have recognized that because of the arms length nature of these negotiations, the Bankers Blanket Bond is not a contract of adhesion and the usual rule construing ambiguities against the insurer is inappropriate. Likewise, the PLF Plan was developed by attorneys who are themselves covered by the Plan and are appointed by the elected and appointed representatives of the Oregon State Bar. The developers of the Plan have received substantial input directly from the membership. It is accordingly inappropriate to treat this Plan as a contract of adhesion.

**Purpose of Bracketed Titles.** In Section I(3) of the Plan WE have attempted to group exclusions according to subject matter. Bracketed titles have been inserted designating the subject matter of the exclusions which follow the title. These bracketed titles are simply for the convenience of the reader in locating applicable exclusions. Such titles are not part of the Plan and should not be used as an aid in interpretation. The titles neither expand nor reduce the scope of the exclusions which follow. Likewise, the titles do not imply any limitation on the applicability of other exclusions. Thus, the fact an exclusion does not fall under the title "business risk," for example, does not mean the exclusion will not be applicable in a business risk situation. Likewise the bracketed titles in Section III are not intended to alter the meaning of that Section.

**Purpose of Comments.** These Comments are similar in form to the UCC and Restatements. They are intended to aid in the construction of the Plan language. By the addition of these Comments, we hope to avoid the existence of any ambiguities, to assist attorneys in interpreting the coverage available to them, and to provide a specific basis for interpretation by judges and arbitrators.

**Retroactivity.** Because this is a claims-made Plan, unless specifically stated otherwise in the Comments, the coverage available to the COVERED PARTY is determined by the terms of the Plan in force at the time the claim is first made, not the terms of the Plan in force at the time of the act, error or omission giving rise to the claim.

## SECTION I — COVERAGES

1. Coverage Grant.

   a. WE will pay those sums that the COVERED PARTY becomes legally obligated to pay as damages because of CLAIMS arising out of a COVERED ACTIVITY to which this Plan applies. No other obligation or liability to pay sums or perform acts or services is covered unless specifically provided for under Paragraph 2 — Supplementary Coverage.

   b. This Plan applies only to CLAIMS first made against a COVERED PARTY during the COVERAGE PERIOD.

      (1) A CLAIM seeking damages will be deemed to have been made when an ACTION is filed or initiated, when notice of such CLAIM is received by any COVERED PARTY or by US, or at such time as the COVERED PARTY knew or should have known that a COVERED ACTIVITY could result in a CLAIM, whichever comes first.

      (2) Two or more CLAIMS arising out of a single COVERED ACTIVITY or arising out of a series of related COVERED ACTIVITIES, whenever made, shall be deemed to have been first made at the time the earliest CLAIM arising out of any such COVERED ACTIVITY was first made.

   c. This Plan applies only to ACTIONS brought in the United States, its territories or possessions, or Canada.

   d. This Plan does not apply to a COVERED PARTY who participates in any manner in the presentation of any false, fraudulent or collusive CLAIM or assertion of coverage.

   e. The amount WE will pay for damages is limited as described in Section VI — LIMITS OF COVERAGE AND DEDUCTIBLE.

   f. Coverage under this Plan is conditioned upon full and timely payment of all assessments owed by YOU.

### COMMENTS

**Outline of Section I.** Section I.1. defines the PLF's obligation to indemnify for damages a Covered Party is legally obligated to pay. Section I.2. defines certain additional coverages which are extended. Section I.3. sets out the exclusions to coverage. Section I.4. defines your right to purchase extended reporting coverage to protect against claims made in future years.

**Use of Capitals.** The capitalized terms used in this section and other sections of the Plan are defined in Sections II, III, and IV. The definition of COVERED PARTY appearing in Section II and the definition of COVERED ACTIVITY appearing in Section III are particularly crucial to the understanding of the coverage grant.

**Claims-made Form.** This is a claims-made Plan. It applies to claims first made during the time period shown in the Declarations. Claims first made either prior to or subsequent to that time period would not be covered by this Plan although they may be covered by a prior or subsequent Plan.

**When Claim First Made; Multiple Claims.** Subparagraph b(1) of this section is intended to make clear that the earliest of the several events listed determines when the claim is first made. Subsection b(2) states a special rule applicable when several claims arise out of the same or related activities. Under this rule, all such claims are considered first made at the time the earliest of the several claims is first made. Thus, regardless of the number of claimants asserting claims, the number of claim years involved, or the number of transactions giving rise to the claims, all such claims are treated as first made in the earliest applicable Plan year and only one limit of liability applies.

**Failure to Pay Assessments.** Under subparagraph f., failure to pay applicable assessments when due eliminates coverage for any claim made after the date of such failure. Thus, if YOU failed to pay the assessment due by January 1 until March 1, YOU would have no coverage under this Plan for claims first made between January 1 and March 1.

---

2. Supplementary Coverage.

   a. Until the LIMITS OF COVERAGE extended by this Plan are exhausted, WE will defend any ACTION against a COVERED PARTY seeking damages to which this coverage applies. WE have the sole right to investigate, settle, designate defense attorneys and otherwise conduct the defense of any CLAIM. However, failure on OUR part to settle a CLAIM within the LIMITS OF COVERAGE shall not create any additional obligation on OUR part in contract, tort or otherwise, regardless of the amount of any judgment or award subsequently entered against YOU or any other COVERED PARTY.
   b. With respect to any ACTION we defend, WE will pay all CLAIMS EXPENSE WE may incur. These payments shall reduce the LIMITS OF COVERAGE.

**COMMENTS**

**Scope of Duty to Defend.** Subsection a. of this section defines OUR obligation to defend. The obligation to defend continues only until the LIMITS OF COVERAGE are exhausted.

**Cost of Defense.** Subsection b. obligates the PLF to pay costs of defense. Only those expenses incurred by or with OUR authority are covered.

**Control of Defense.** Subsection a. also allocates to the PLF control of the investigation, settlement and defense of the claim.

**No Implied Duty of Good Faith.** The final sentence of subsection a. eliminates any duty WE might otherwise have to settle claims within the LIMITS OF COVERAGE. Traditional insurance law infers from the power to control the defense and settlement of the claim an implied duty on the insurer to act in good faith in carrying out this responsibility. This implied duty renders the insurer liable for negligent conduct which results in the insured suffering an excess judgment. See, e.g., *Maine Bonding v. Centennial Ins. Co.*, 298 Or 514, 693 P2d 296 (1985). One aspect of this duty is a duty to settle within policy limits whenever there is a reasonably foreseeable risk that the insured will suffer an excess judgment if the claim is not settled.

WE are exempt from insurance laws and are not an insurance company. The implied contractual obligations imposed upon insurers in their relationship with unsophisticated insureds is inappropriate to the relationship between US and the attorney WE cover. Attorneys are sophisticated consumers and can make reasoned decisions respecting the risk of excess exposure. Attorneys who wish to avoid the risk of an excess judgment can usually do so by purchasing additional coverage from an excess insurer.

Furthermore, the PLF Board of Directors is ordinarily involved in decisions respecting the settlement of any case with realistic excess exposure. Since the Board is appointed by the Board of Governors of the Oregon State Bar and, as such, is the chosen representative of the attorneys covered by US, there is no reason to anticipate either the Board or the staff working for it would recklessly or maliciously expose an attorney to an excess judgment. Accordingly, WE believe the imposition of a duty of good faith on US is an inappropriate use of the assessments paid by the attorneys covered by US.

Subsection a., therefore, expressly provides that the traditional duty to settle implied in the typical insurance policy is not available. There is no implied duty to settle; on the contrary, there is an express disclaimer of any such duty.

---

3. Exclusions.
[CERTIFICATE OF EXEMPTION EXCLUSION]

   a. This Plan does not apply to any CLAIM based upon or arising out of YOUR conduct during a period of time for which YOU have been granted a certificate of exemption by US.

**COMMENTS**

Only attorneys engaged in the "private practice of law" in Oregon are eligible for or mandated to carry coverage with the PLF. ORS 9.080(2)(a). An attorney not engaged in the private practice of law in Oregon can avoid the mandatory purchase of coverage by filing with US a certificate showing the attorney is not subject to the mandate. This provision makes clear that YOUR conduct during the period of any such exemption is not covered even though the conduct would otherwise be a COVERED ACTIVITY. For example, if you held a certificate of exemption during calendar year 1986 and a claim was later made against you for conduct during 1986, this Plan would not apply even though the claim was first made during this PLAN PERIOD.

---

[WRONGFUL CONDUCT EXCLUSIONS]

b. This Plan does not apply to any CLAIM based upon or arising out of:

(1) any intentional, dishonest, fraudulent, criminal, malicious or knowingly wrongful acts, errors or omissions committed by YOU or at YOUR direction or in which YOU acquiesce or remain passive after having personal knowledge thereof, or

(2) criminal conduct committed by someone for whose conduct YOU are legally liable.

**COMMENTS**

This exclusion states two rules. Subsection (1) sets out the circumstances in which YOUR own wrongful conduct will eliminate coverage. Subsection (2) sets out the circumstances in which YOUR vicarious liability for the conduct of others is not covered. We have excluded YOUR vicarious liability for the criminal conduct of others. This exclusion applies whether or not the actor is in fact convicted of a crime so long as the conduct is in fact criminal.

Primary responsibility to compensate for criminal conduct of another attorney more appropriately rests with that attorney and the Client Security Fund. WE have excluded YOUR vicarious liability for the consequences of such conduct because we believe such conduct is more appropriately covered by your purchase of a fidelity bond. In that way those who need protection against criminal conduct of their partners, employees and fellow-shareholders can acquire that protection at their own expense and without increasing the assessments of those required to carry coverage with US but not desiring protection from criminal conduct of others.

For a case discussing YOUR potential liability for the criminal conduct of a partner, see *Roach v. Mead*, 301 Or 383, 722 P2d 1229 (1986).

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c. This Plan does not apply to any CLAIM based upon or arising out of a proceeding brought against YOU by the Oregon State Bar or any similar entity.

**COMMENTS**

WE are not in the business of defending bar disciplinary proceedings. This exclusion makes clear there is no duty to defend such claims even if the facts giving rise to the claim involve a COVERED ACTIVITY.

---

d. This Plan does not apply to that part of any CLAIM:

(1) asserted directly against a COVERED PARTY for punitive or exemplary damages, fines, sanctions or penalties, or

(2) asserted directly or indirectly against a COVERED PARTY, arising out of the imposition on the COVERED PARTY or others of any attorneys fees, costs, fines, penalties, sanctions or other amounts imposed under any federal or state statute, administrative rule, court rule or case law intended to penalize bad faith conduct and/or the assertion of frivolous or bad faith claims or defenses.

**COMMENTS**

A COVERED PARTY may become subject to punitive or exemplary damages, fines, sanctions and penalties in two ways. The COVERED PARTY may have these damages assessed directly against the COVERED PARTY or the COVERED PARTY may have a client or other person sue the COVERED PARTY for indemnity for causing the client to be subjected to these damages.

Subsection (1) of this exclusion applies to direct actions against the COVERED PARTY. It excludes coverage for that part of any claim asserting such damages. For example, if YOU are sued for punitive damages, YOU are not covered.

Subsection (2) of this exclusion applies to both direct actions against a COVERED PARTY and actions for indemnity brought by others. The damages excluded from coverage, however, are limited under this subsection to various penalties and sanctions intended to penalize bad faith conduct or the assertion of frivolous or bad faith claims or defenses. The courts have become increasingly intolerant of attorneys' improper actions in several areas including trial practice, discovery and conflicts of interest. Statutes, court rules and common law approaches imposing various monetary sanctions have been developed to deter such inappropriate conduct. The purpose of these sanctions would be threatened if WE were to indemnify the guilty attorney and pay the cost of indemnification out of the assessments paid by all attorneys.

Thus, if YOU cause YOUR client to be subjected to a punitive damage award (based upon the client's wrongful conduct toward the claimant) because of a failure, for example, to assert a statute of limitations defense, WE will cover YOUR liability for the punitive damages suffered by YOUR client. Subsection (1) does not apply because the action is not a direct action for punitive damages and subsection 2 does not apply because the punitive damages suffered by YOUR client are not the type of damages described in subsection (2).

On the other hand, if YOU cause YOUR client to be subjected to an award of attorneys fees under Rule 11 of the Federal Rules of Civil Procedure or under ORS 20.105 or 20.125 or other similar statute, subsection (2) applies and the claim for such damages will be excluded.

---

[BUSINESS ACTIVITY EXCLUSIONS]

e. This Plan does not apply to that part of any CLAIM based upon or arising out of YOUR conduct as an officer, director,

partner, trustee, employee, or shareholder of any entity except an Oregon law professional corporation.

**COMMENTS**

A COVERED PARTY, in addition to his/her role as an attorney, may clothe himself/herself as an employee, partner, officer, director or trustee of an entity. This exclusion eliminates coverage for the COVERED PARTY'S liability while acting in these capacities. However, the exclusion does not apply if the liability is based upon such status in an entity dedicated to the practice of law such as a law firm partnership or professional corporation. The term "Oregon law professional corporation" as used in this exclusion refers to an Oregon corporation or partnership engaged solely in the practice of law.

f. This Plan does not apply to any CLAIM by or on behalf of any business enterprise which is owned by YOU or in which YOU are a partner or employee, or which is controlled, operated, or managed by YOU either individually or in a fiduciary capacity, including the ownership, maintenance or use of any property in connection therewith. For purposes of this exclusion, "owned" shall not include a ten percent or less interest held by YOU and those YOU control.

**COMMENTS**

Experience indicates that a certain level of intimacy with a client can result in an increased risk of loss because of two factors: (1) the attorney's services may be rendered in a more casual and less thorough manner than if the services were extended at arms length and (2) after a loss, the attorney may feel particularly motivated to assure the client's recovery. WE have been exposed to a surprising number of claims because of these two factors. While WE are cognizant of a natural desire of attorneys to serve those with whom YOU are closely connected, WE have determined that coverage for such services should be excluded. Exclusion f. delineates the level of intimacy required to defeat coverage.

g. This Plan does not apply to any CLAIM made by:

(1) YOUR present, former, or prospective partner or employee, or

(2) A present, former, or prospective officer, director, or stockholder employee of a professional corporation in which you were a shareholder,

unless such CLAIM arises out of YOUR conduct in an attorney-client capacity.

COMMENTS

WE do not always cover YOUR conduct in relation to YOUR past, present, or prospective partners, employees and fellow-shareholders even if such conduct arises out of a COVERED ACTIVITY. Coverage is limited by this exclusion to YOUR conduct in relation to such persons to situations where YOU are acting as their attorney and they are YOUR client.

h. This Plan does not apply to any CLAIM based upon or arising out of any business transaction subject to DR 5-104(A) in which YOU participate with a client unless a disclosure in the form of Disclosure Form DR 5 attached as Exhibit A to this Plan has been properly executed prior to the occurrence giving rise to the CLAIM and forwarded to US in a timely manner.

COMMENTS

**Form DR 5.** Fonn DR 5, referred to above, is attached to this Plan following Section XIV. The form includes an explanation of DR 5-104(A) prepared by General Counsel for the Oregon State Bar.

**Applicability of Exclusion.** When an attorney engages in a business transaction with a client, the attorney is under an ethical duty to make certain disclosures to the client. See DR 5-104(A). WE are not in the business of interpreting disciplinary rules and this exclusion is not intended to constitute an interpretation of DR 5-104(A). Instead, WE are invoking the body of law interpreting DR 5-104(A) to define when the exclusion is applicable.

**Use of Our Form Not Mandated.** Because of the obvious conflict of interest and the high duty placed upon attorneys, where the exclusion is applicable the attorney is nearly always determined to be liable when things go wrong. The only effective defense is to show that the attorney has made full disclosure. Form DR 5 is OUR attempt to set out an effective disclosure which will provide an adequate defense to such claims. WE are sufficiently confident that this disclosure will be effective to agree that the exclusion will not apply if YOU use OUR proposed form. YOU are free to use YOUR own form in lieu of OUR form, but if YOU do so YOU proceed at YOUR own risk, *i.e.*, if YOUR disclosure is less effective than OURS, the exclusion will apply. Use of OUR form is not intended to assure YOU of compliance with the ethical requirements applicable to YOUR particular circumstances. It is YOUR responsibility to consult DR 5-104(A) and add any disclosures necessary to satisfy the disciplinary rules.

**Timing of Disclosure.** To be effective, it is important that WE can prove the disclosure was made prior to entering into the business transaction. Therefore, the disclosure should be reduced to writing and signed prior to entering into the transaction. There may be limited situations in which reducing the required disclosure to writing or delivering it to US prior to entering into the transaction is impractical. In those circumstances, execution or delivery after entry into the transaction will not render the exclusion effective provided the execution takes place while the client still has an opportunity to withdraw from the transaction and the effectiveness of the disclosure is

not compromised. Additional language may be necessary to render the disclosure effective in these circumstances.

**Retroactivity.** This exclusion does not apply to business transactions with a client occurring prior to January 1, 1987, provided at the time YOU entered into the business transaction you complied with the then applicable exclusion. See exclusion 16 of the 1984, 1985 and 1986 PLF Plans.

---

i. This Plan does not apply to any CLAIM based upon or arising out of any act, error or omission committed by YOU (or by someone for whose conduct YOU are legally liable) while in the course of rendering INVESTMENT ADVICE if the INVESTMENT ADVICE is in fact either the sole cause or a contributing cause of any resulting damage. However, if all INVESTMENT ADVICE rendered by YOU constitutes a COVERED ACTIVITY described in paragraph 3 of Section III, this exclusion shall not apply unless part or all of such INVESTMENT ADVICE is described in paragraphs d, e, f or g of the definition of INVESTMENT ADVICE.

**COMMENTS**

WE have suffered extreme losses as a result of attorneys engaging in investment advice activity. It was never intended that the Plan cover such activities. Since 1984, the Plan has contained an investment advice exclusion. See, *e.g.*, exclusion 17 of 1986 Plan. Nevertheless, losses have continued in situations where the COVERED PARTY has rendered both investment advice and legal advice. In addition, some claims have resulted where the attorney has provided investment advice in the guise of legal advice.

Exclusion i. represents a totally new approach to this problem. Instead of excluding all investment advice, WE have clearly delineated specific activities which will not be covered whether or not legal as well as investment advice is involved. These specific activities are defined in Section IV under the definition of INVESTMENT ADVICE. OUR choice of delineated activities was dictated by specific cases which exposed US in situations never intended to be covered. WE are cognizant that litigation attorneys doing structured settlements and attorneys in business practice and tax practice legitimately engage in the rendering of general investment advice as a part of their practice. In delineating the activities to be excluded WE have attempted to retain coverage for these legitimate practices. For example, the last sentence of the exclusion permits coverage for certain activities normally undertaken by conservators and personal representatives (i.e. COVERED ACTIVITIES described in paragraph 3 of Section III) when acting in that capacity even though the same activities would not be covered if performed in an attorney-client capacity.

The exclusion applies whether the COVERED PARTY is directly or vicariously liable for the INVESTMENT ADVICE.

WE have the burden of proving that the activity involved is INVESTMENT ADVICE. The party asserting coverage has the burden of proving the last sentence of the exclusion renders it inapplicable to the activity involved.

---

[PERSONAL RELATIONSHIP AND BENEFITS EXCLUSIONS]

j. This Plan does not apply to any CLAIM for damages or the recovery of funds, property or fees which have or will accrue directly or indirectly to the benefit of any COVERED PARTY.

COMMENTS

None.

k. This Plan does not apply to any CLAIM asserted by YOUR spouse, parent, child or any member of YOUR household.

COMMENTS

None.

[SPECIAL CAPACITY EXCLUSIONS]

l. This Plan does not apply to any CLAIM arising out of a COVERED ACTIVITY described in paragraph 3 of Section III unless the CLAIM is brought by or for the benefit of the beneficiary of the fiduciary relationship and arises out of a breach of that relationship.

COMMENTS

Paragraph 3 of Section III provides coverage for YOUR acts as a personal representative, administrator, conservator, executor, guardian or trustee. See the referenced paragraph for details of this coverage.

m. This Plan does not apply to any CLAIM arising out of YOUR activity as a fiduciary under any employee retirement, deferred benefit, or other simular plan.

COMMENTS

None.

n. This Plan does not apply to any CLAIM arising out of notarized certification or acknowledgement of a signature without the physical appearance before such notary public unless such CLAIM arises from the acts of YOUR employee and YOU have no actual knowledge of such act.

COMMENTS

None.

[GOVERNMENT ACTIVITY EXCLUSION]

o. This Plan does not apply to any CLAIM arising out of YOUR conduct as an officer, employee, or agent, whether elective or appointive, of a public body which comes within the defense and indemnity requirements of ORS 30.285 and ORS 30.287. If a public body rejects the defense and indemnity of such a CLAIM, WE will provide coverage for such COVERED ACTIVITY and will be subrogated to all YOUR rights against the public body for recovery of OUR CLAIMS EXPENSE.

**COMMENTS**

None.

[HOUSE COUNSEL EXCLUSION]

p. This Plan does not apply to any CLAIM arising out of YOUR conduct as an employee in an employer-employee relationship other than YOUR conduct as an employee for an Oregon law professional corporation.

**COMMENTS**

The term "Oregon law professional corporation" as used in this provision refers to an Oregon corporation or partnership engaged solely in the practice of law.

[GENERAL TORTIOUS CONDUCT EXCLUSIONS]

q. This Plan does not apply to any CLAIM for bodily injury, PERSONAL INJURY, ADVERTISING INJURY, sickness, disease or death of any person, or injury to, or loss of or destruction of any property or loss of use thereof, or mental anguish or emotional distress in connection with such CLAIM.

**COMMENTS**

The claims excluded are not typical errors-and-omissions torts and were, therefore, considered inappropriate for coverage under the Plan. YOU are encouraged to seek coverage for these claims through commercial insurance markets.

r. This Plan does not apply to any CLAIM based upon or arising out of harassment or discrimination by YOU on the basis of race, creed, age, sex, physical or mental handicap, or sexual preference unless such CLAIM arises out of YOUR professional service in an attorney-client relationship.

**COMMENTS**

The claims excluded are not typical errors-and-omissions torts and were, therefore, considered inappropriate for coverage under the Plan.

[PATENT EXCLUSION]

s. This Plan does not apply to any CLAIM based upon or arising out of professional services rendered or any act, error or omission committed in relation to the registration of patents.

**COMMENTS**

None.

4. Option to Extend Claims Reporting Period

YOU can obtain continuing coverage under this Plan for YOUR COVERED ACTS committed prior to the end of the COVERAGE PERIOD by giving notice to US not later than 60 days after the end of the COVERAGE PERIOD and making payment of an additional assessment as determined by US within 30 days from receipt of billing from US. Any extension granted under this paragraph shall not increase the LIMITS OF COVERAGE available under this Plan.

**COMMENTS**

This paragraph sets forth YOUR right to extend the reporting period within which a claim must be made. Exercise of YOUR rights hereunder does not increase or reinstate the limits available to YOU. WE are aware that lifetime limits of $300,000 may be inadequate and are considering offering to those who satisfy specific underwriting criteria an opportunity to reinstate limits for an additional charge. WE have determined that WE can properly underwrite on a selective basis such coverage for persons no longer engaged in the private practice of law.

## SECTION II — WHO IS A COVERED PARTY

1. The following are COVERED PARTIES:

   a. YOU.

   b. In the event of YOUR death, adjudicated incapacity, or bankruptcy, YOUR conservator, guardian, trustee in bank ruptcy, legal or personal representative but only when acting in such capacity.

   c. Any person, firm or corporation legally liable for your COVERED ACTIVITIES, but only to the extent such legal inability arises from YOUR COVERED ACTIVITIES.

2. Notwithstanding paragraph 1, any business enterprise (except an Oregon law professional corporation) and any partner, proprietor, officer, director, stockholder or employee of such enterprise is not a COVERED PARTY.

**COMMENTS**

The term "Oregon law professional corporation" as used in this provision refers to an Oregon corporation or partnership engaged solely in the practice of law.

## SECTION III — WHAT IS A COVERED ACTIVITY

The following are COVERED ACTIVITIES:

[YOUR CONDUCT]

1. Any act, error or omission committed by YOU which satisfies all of the following criteria:

   a. YOU committed the act, error or omission in rendering professional services in YOUR capacity as an attorney, or in failing to render professional services that should have been rendered in YOUR capacity as an attorney.

   b. At the time YOU rendered or failed to render these professional services:

      (1) YOUR principal office was located within the state of Oregon, and

      (2) YOU were licensed to practice law in the state of Oregon, and

      (3) such activity occurred after any Retroactive Date shown in the Declarations.

[CONDUCT OF OTHERS]

2. Any act, error or omission committed by a person for whom YOU are legally liable in YOUR capacity as an attorney; provided at the time of the act, error or omission each of the following criteria was satisfied:

   a. The act, error or omission causing YOUR liability:

      (1) arose while YOU were licensed to practice law in the state of Oregon, and

      (2) arose while YOUR principal office was located within the state of Oregon, and

      (3) occurred after any Retroactive Date shown in the Declarations.

   b. The act, error or omission, if committed by YOU, would constitute the rendering of professional services.

   c. The act, error or omission was not committed by an attorney who at the time of the act, error or omission:

(1) maintained his or her principal office outside the state of Oregon, and

(2) was in an "Of Counsel" relationship with YOU or with a professional corporation in which YOU were a shareholder, or was YOUR employee, partner, fellow shareholder in a professional corporation, or was an employee of a professional corporation in which YOU were a shareholder.

[YOUR CONDUCT IN A SPECIAL CAPACITY]

3. Any act, error or omission committed by YOU in YOUR capacity as a personal representative, administrator, conservator, executor, guardian or trustee; provided, at the time of the act, error or omission, each of the following criteria was satisfied:

   a. YOUR principal office was located within the state of Oregon, and

   b. YOU were licensed to practice law in the state of Oregon, and

   c. such activity occurred after any Retroactive Date shown in the Declarations.

**COMMENTS**

COVERED ACTIVITIES have been divided into three categories. Subparagraph 1 deals with coverage for YOUR conduct as an attorney. Subparagraph 2 deals with coverage for YOUR liability for the conduct of others. Subparagraph 3 deals with coverage for YOUR conduct in a special capacity (e.g. as a personal representative of an estate).

WE have consciously used the term "special capacity" rather than "fiduciary" to avoid any implication this coverage includes fiduciary obligations other than those specifically identified.

The statute authorizing the establishment of the PLF mandates coverage for attorneys engaged in the "private practice of law in Oregon." While the definition of COVERED ACTIVITY incorporates many of the criteria used to define "private practice of law in Oregon," WE have consciously avoided using or defining that term in the Plan because questions concerning who is exempt from the statutorily mandated coverage are different from questions concerning what activity is covered under the Plan.

This Section introduces the concept of a Retroactive Date. No Retroactive Date will be applicable to any attorney who has held coverage with US continuously since the inception of the PLF. Attorneys who first obtained coverage with US at a later date and attorneys who have interrupted coverage will find in the Declarations a Retroactive Date. This date will be the date on which YOUR most recent period of continuous coverage commenced. WE do not cover CLAIMS arising out of conduct prior to the Retroactive Date.

## SECTION IV — DEFINITIONS

Throughout this Plan, when appearing in capital letters:

1. The word "ACTION" refers to any legal or equitable proceedings (including arbitration, mediation or similar proceeding) seeking money damages.

2. The words "ADVERTISING INJURY" refer to injury based upon or arising out of one or more of the following offenses:

   a. oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

   b. oral or written publication of material that violates a person's right of privacy;

   c. misappropriation of advertising ideas or styles of doing business; or

   d. infringement of copyright, title or slogan.

3. The word "CLAIM" refers to any ACTION or demand for money damages.

4. The words "CLAIMS EXPENSE" refer to:

   a. fees charged by any attorney designated by US;

   b. all other fees, costs and expenses resulting from the investigation, adjustment, defense and appeal of a CLAIM, if incurred by US;

   c. fees charged by any attorney designated by the COVERED PARTY with our written consent.

   However, CLAIMS EXPENSE does not include OUR costs for salaries of regular employees or of officials or OUR other routine administrative costs.

5. The words "COVERAGE PERIOD" refer to the coverage period shown in the Declarations under the heading "COVERAGE PERIOD."

6. The words "INVESTMENT ADVICE" refer to any of the following activities:

   a. YOUR advising any person, firm or corporation respecting the value of a particular investment, or recommending investing in, purchasing or selling a particular investment.

b. YOUR managing any investment.

c. YOUR buying or selling any investment for another.

d. YOUR acting as a broker for a borrower or lender.

e. YOUR issuing or promulgating any economic analysis of any investment.

f. YOUR giving advice of any nature where your compensation for such advice is in whole or in part contingent or dependent upon the success or failure of a particular investment.

g. YOUR inducing someone to make a particular investment.

7. The words "PERSONAL INJURY" refer to injury based upon or arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. Wrongful entry or eviction of a person from a room, dwelling or premises that the person occupies.

d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or

e. Oral or written publication of material that violates a person's right of privacy.

COMMENTS

None.

## SECTION V — LIMITS OF COVERAGE AND DEDUCTIBLE

1. OUR maximum liability is $300,000 for indemnity and CLAIMS EXPENSE for all CLAIMS first made during the COVERAGE PERIOD. This $300,000 includes any amounts the COVERED PARTY is obligated to pay as a deductible. The making of CLAIMS against more than one COVERED PARTY shall not increase OUR LIMITS OF COVERAGE.

2. The COVERED PARTY is obligated to pay any deductible shown in the Declarations. This amount shall be paid by the COVERED PARTY within 10 days after written demand from US.

### COMMENTS

WE now have a single limit of coverage of $300,000 which is applicable to all claims for indemnity and claims expense during the COVERAGE PERIOD. CLAIMS EXPENSE specifically includes attorneys fees.

The limits of coverage apply to claims against more than one COVERED PARTY so that naming all partners, fellow-shareholders or associates of a COVERED PARTY does not increase the amount available.

An example illustrating the application of subparagraph 1 follows. The example assumes a total loss of $350,000 consisting of $285,000 paid to the claimant, $5000 paid to defense counsel appointed by US, and an applicable deductible of $10,000. This loss would be paid as follows:

| | | |
|---|---|---|
| 1. | $285,000 | — to claimant. |
| 2. | 5,000 | — to defense counsel. |
| | $290,000 | — total paid by US. |
| 3. | $ 10,000 | — YOUR deductible. |
| 4. | 50,000 | — loss in excess of $300,000 limit. |
| | $ 60,000 | — total paid by YOU. |

## SECTION VI — RELATION TO OTHER PLANS ISSUED BY US

When this Plan together with other Plans issued by US apply to the same CLAIM or CLAIMS, OUR $300,000 limit for indemnity and CLAIMS EXPENSE is the maximum amount available for all CLAIMS first made during the COVERAGE PERIOD regardless of the number of Plans which may apply.

COMMENTS

WE issue Plans to all lawyers in the state of Oregon engaged in the private practice of law. As a consequence, WE find ourselves defending more than one lawyer both in situations where lawyers from different firms have participated in the handling of the same case and in situations where one or more lawyers from the same firm have handled a case and the other lawyers in the firm are alleged to be vicariously liable for this conduct. In all these situations, WE have determined it is inappropriate for US to extend more than one limit. Accordingly, WE have provided that there is only one $300,000 limit available for all claims first made during any coverage period regardless of the number of Plans which may apply to that particular claim or set of claims. In short, whenever a claimant or group of claimants assert the same or related claims, OUR entire liability is limited to a total of $300,000 regardless of the number of Plans WE have issued.

## SECTION VII — NOTICE OF CLAIMS

1. The Covered Party shall, as a condition precedent to the right of protection afforded by this coverage, give US, at the address shown in the Declarations, as soon as practicable, written notice of any CLAIM made against the COVERED PARTY.

2. In the event an ACTION is brought against the COVERED PARTY, the COVERED PARTY shall immediately notify and deliver to US, at the address shown in the Declarations, every demand, notice, summons or other process received by the COVERED PARTY or the COVERED PARTY'S representatives.

3. If during the COVERAGE PERIOD, the COVERED PARTY becomes aware of a specific act, error or omission for which coverage is provided under this Plan, and if the COVERED PARTY shall during the COVERAGE PERIOD give written notice to US of:

   a. The specific act, error or ommision; and

   b. The injury or damage that has or may result; and

   c. The circumstances by which the COVERED PARTY first became aware of such act, error or omission;

   then any CLAIM that is subsequently made against the COVERED PARTY based upon or arising out of such act, error or omission shall be deemed to have been made during the COVERAGE PERIOD.

COMMENTS

None.

## SECTION VIII — COVERAGE DETERMINATIONS

1. Any dispute as to the applicability of this Plan between the COVERED PARTY (or anyone claiming through the COVERED PARTY) and US shall be determined by arbitration. Arbitration shall be pursuant to the arbitration rules of the Multnomah County Circuit Court but without limitation as to the amount in controversy and without right of appeal except for such appeal as is provided by ORS 33.340.

2. If we defend under a reservation of rights respecting the applicability of this Plan to the CLAIM, the COVERED PARTY who is the recipient of the reservation shall not be entitled to demand settlement of the CLAIM for any amount until all applicable coverage issues have been finally determined by agreement, award or judgment.

**COMMENTS**

In order to reduce expense and facilitate prompt resolution of disputes concerning coverage a timely procedure is necessary. Use of arbitration is the preferred method. Therefore, unless YOU have elected to pay an additional assessment to purchase an endorsement deleting paragraph 1 of this section, YOU and anyone else claiming coverage under this Plan are obligated to proceed in arbitration. This obligation extends not only to the party seeking coverage, but anyone claiming through them. Thus, if a COVERED PARTY should suffer a judgment and the judgment creditor seeks to garnish US or proceed in a direct action against US or assert a declaratory action against US seeking a determination that WE have coverage, the judgment creditor must proceed in arbitration.

Where a coverage dispute exists and WE defend a claim against a COVERED PARTY under a reservation of rights the use of arbitration should resolve the coverage dispute in a reasonable time. During the pendency of the arbitration the COVERED PARTY may not demand settlement. This provision is included to encourage prompt resolution of coverage issues so that the parties to the litigation can readily determine who should respond to the claimant.

## SECTION IX — ASSISTANCE, COOPERATION AND DUTIES OF COVERED PARTY

1. As a condition of coverage under this Plan, the COVERED PARTY shall cooperate with US and shall:

   a. Provide to US within 30 days after written reque[illegible] sworn statements providing full disclosure concerning any CLAIM or any aspect thereof,

   b. Attend and testify when requested by US,

   c. Furnish to US within 30 days after written request, all files, records, papers and documents which may relate to any ACTION against the COVERED PARTY,

   d. Execute authorizations, documents, papers, loan receipts, releases or waivers when so requested by US,

   e. Submit to arbitration of any CLAIM when requested by US,

   f. Permit US to cooperate and coordinate with any excess or umbrella insurance carrier as to the investigation, defense and settlement of all CLAIMS,

   g Not communicate with any person other than US or an insurer for the COVERED PARTY regarding any CLAIM that has been made against the COVERED PARTY, after notice to the COVERED PARTY of such CLAIM, without OUR written consent,

   h. Assist US in bringing any subrogation or similar claim. OUR subrogation or similar rights will not be asserted against any employee, investigator, legal assistant, partner, fellow shareholder or associate of any COVERED PARTY except for claims arising from intentional, dishonest, fraudulent or malicious conduct of such person.

2. The COVERED PARTY shall not, except at his or her own cost, voluntarily make any payment, assume any obligation, or incur any expense.

**COMMENTS**

The obligations of the COVERED PARTY under this section as well as the other sections of the Plan are to be performed without charge to US.

## SECTION X — ACTION AGAINST US

No ACTION shall be brought against US unless the COVERED PARTY has fully complied with all terms of this Plan.

**COMMENTS**

None.

## SECTION XI — SUPPLEMENTAL ASSESSMENTS

If the accumulated annual assessments and any earnings thereon are insufficient to pay OUR due and owing judgments, awards, settled CLAIMS and current expenses at the end of any 90-day period, WE are authorized to and shall further assess YOU YOUR pro rata share of the total assessed sum necessary to satisfy the outstanding obligations and provide future operating expenses until the date of the next general assessment.

WE are authorized to make additional assessments against YOU for this COVERAGE PERIOD until all OUR liability for this COVERAGE PERIOD is terminated, whether or not YOU are a COVERED PARTY under a Plan issued by us at the time the assessment is imposed.

**COMMENTS**

This section is limited to a statement of YOUR contractual obligation to pay supplemental assessments should the assessments originally levied be inadequate to pay all CLAIMS, CLAIMS EXPENSE and other expenses. It is not intended to cover other assessments levied by US such as the regular assessment YOU initially paid to purchase this Plan or any special underwriting assessment levied against YOU.

## SECTION XII — RELATION OF OUR COVERAGE TO INSURANCE COVERAGE OR OTHER COVERAGE

If the COVERED PARTY has valid and collectible insurance coverage or other obligation to indemnify which also applies to any loss or CLAIM covered by this Plan, WE shall not be liable under the Plan until the limits of the COVERED PARTY'S insurance or other obligation to indemnify, including any applicable deductible, have been exhausted, unless such insurance or other obligation to indemnify is written only as specific excess coverage over the LIMITS OF COVERAGE of this Plan.

**COMMENTS**

This Plan is not an insurance policy. To the extent that insurance or other coverage exists, this Plan may not be invoked. This provision is designed to preclude the application of the other insurance law rules applicable under the *Lamb-Weston* doctrine.

## SECTION XIII — WAIVER AND ESTOPPEL

Notice to or knowledge of OUR representative, agent, employee or any other person shall not effect a waiver, constitute an estoppel or be the basis of any change in any part of this Plan nor shall the terms of this Plan be waived or changed except by written endorsement issued and signed by OUR authorized representative.

**COMMENTS**

None.

## SECTION XIV — ASSIGNMENT

The interest hereunder of any COVERED PARTY is not assignable.

**COMMENTS**

None.

**Form DR 5**

[Date]

_____

_____

_____

_____

RE: _____

Dear _____:

Because I am entering into this business venture with you, I am required by ethical and professional liability protection requirements to point out to you the possibility of conflicts in our interests. The enclosed article explains those considerations in some detail.

Whether or not I perform services of a legal nature for our business venture, there always exists the possibility of a conflict. You are advised that you should have independent counsel representing you in this business venture.

Please sign the enclosed copy of this letter, where indicated, acknowledging receipt of this letter and enclosure.

Very truly yours,

_____

I acknowledge receipt of this letter and enclosure:

_____ _____

[date] [client's name]

Enclosure: BUSINESS DEALS CAN CAUSE PROBLEMS (complying with DR5-104(A)) by Jeffrey D. Sapiro (Reprinted from "Oregon State Bar Bulletin," June, 1981).

## BUSINESS DEALS CAN CAUSE PROBLEMS

### (complying with DR5-104(A))

Something that clients often lose sight of is that attorneys are not only legal advisors, but are business people as well.

It is no secret that most practitioners wish to build a successful practice, rendering quality legal services to their clients, as a means of providing a comfortable living for themselves and/or their families. Given this objective, it is not surprising that many attorneys are attracted to business opportunities *outside* their practices that may prove to be financially rewarding. The fact that these business opportunities are often brought to an attorney's attention by a client or through involvement in a client's financial affairs is reason to explore the ethical problems that may arise.

Disciplinary Rule 5-104(A) reads as follows:

> DR 5-104 *Limiting Business Relations with a Client.*
> (A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

The rationale behind this rule should be obvious. An attorney has a duty to exercise professional judgment solely for the benefit of a client, independent of any conflicting influences or loyalties (EC 5-1). If an attorney is motivated by financial interests adverse to that of the client, the undivided loyalty due to the client may very well be compromised. (See also DR 5-101 and DR 5-103.)

A particularly dangerous situation is where the attorney not only engages in the business aspect of a transaction, but also furnishes the legal services necessary to put the deal together. In *In re Brown*, 277 Or 121, 559 P2d 884, reh. den. 277 Or 731, 561 P2d 1030 (1977), an attorney became partners with a friend of many years in a timber business, the attorney providing the legal services and the friend providing the capital. The business later incorporated, with the attorney drafting all corporate documents, including a buy-sell agreement permitting the surviving stockholder to purchase the other party's stock. The Oregon Supreme Court found that the interests of the parties were adverse for a number of reasons, including the disparity in capital invested and the difference in the parties' ages, resulting in a potential benefit to the younger attorney under the buy-sell provisions. Despite the fact that the friend was an experienced businessman, the court held that the attorney violated DR 5-104(A) because the friend was never advised to seek independent legal advice.

Even in those situations where the attorney does not furnish legal services, problems may develop. There is a danger that, while the attorney may feel he or she is merely an investor in a business deal, the client may believe the attorney is using his or her legal skills to protect the client's interests in the venture. Indeed, this may be the very reason the client approached the attorney with a business proposition in the first place.

In order to avoid the ethical problems addressed by DR 5-104(A), the Supreme Court has said that an attorney must *at least* advise the client to seek independent legal counsel. (*In re Bartlett*, 283 Or 487, 584 P2d 296 [1978]). The attorney should disclose not only that a conflict of interest may exist, but should also explain the nature of the conflict "in such detail so that (the client) can understand the reasons why it may be desirable for each to have independent counsel . . ." (*In re Boivin*, 271 Or 419, 424, 533 P2d 171 [1975]). Such a disclosure will help insure that there is no misunderstanding over the role the attorney is to play in the transaction and will help prevent the attorney from running afoul of the disciplinary rule discussed above.

*This article first appeared in the Oregon State Bar Bulletin, June 1981.*

*Jeffrey D. Sapiro*
*Assistant General Counsel*
*Oregon State Bar*

[Editor's Note: In July, 1982, Jeff Sapiro wrote another article for the "OSB Bulletin" describing an increase in disciplinary proceedings for violations of DR 5-104(A) and discussing and citing several recent Supreme Court opinions involving this subject. A review of that article should be very helpful, as well as reading those cases cited therein, particularly the case of *In re Drake*, 292 Or 704 (1982) which provides a comprehensive analysis of DR 5-104(A).]